

1 UNITED STATES BANKRUPTCY COURT
2 DISTRICT OF DELAWARE
3
4 In re: :
5 ACANDS, INC., : Case No. 02-12687 (KG)
6 Debtor. :
7 :
8 In re: :
9 ARMSTRONG WORLD INDUSTRIES, : Case No. 00-04471 (KG)
10 INC., et al., :
11 Debtors. :
12 :
13 In re: :
14 COMBUSTION ENGINEERING, INC., : Case No. 03-10495 (KG)
15 Debtor. :
16 :
17 In re: :
18 THE FLINTKOTE COMPANY, : Case No. 04-11300 (KG)
19 et al., :
20 Debtors. :
21 :
22 In re: :
23 KAISER ALUMINUM CORPORATION, : Case No. 02-10429 (KG)
24 et al., :
25 Debtors. :
26 :
27 In re: :
28 OWENS CORNING, et al., : Case No. 00-03837 (KG)
29 Debtors. :
30 :
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1 In re: :
2 UNITED STATES MINERAL :
3 PRODUCTS COMPANY, : Case No. 01-02471 (KG)
4 Debtor. :
5 _____ :
6 In re: :
7 USG CORPORATION, et al., : Case No. 01-02094 (KG)
8 Debtors. :
9 _____ :
10 In re: :
11 W.R. GRACE & CO., et al., : Case No. 01-01139 (KG)
12 Debtors. :
13 _____ :

United States Bankruptcy Court

824 North Market Street

Wilmington, Delaware

October 14, 2016

10:31 AM

B E F O R E :

HON KEVIN GROSS

U.S. BANKRUPTCY JUDGE

ECR OPERATOR: GINGER MACE

1 HEARING re Motion of Honeywell International Inc. for Access
2 to Rule 2019 Exhibits [Filed: 6/30/2016]

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4 HEARING re Emergency Motion of the North American
5 Refractories Company Asbestos Personal Injury Settlement
6 Trust Advisory Committee to (1) Consolidate and Continue
7 Hearings and (2) Appoint Rule 2019 Expert and Referee
8 [Filed: 8/4/2016]

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25 Transcribed by: Dawn South and Sherri L. Breach

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P R O C E E D I N G S

THE CLERK: Please rise.

THE COURT: Good morning, everyone. You may be seated. It's a pleasure to see you all for this important argument. And Mr. Edelson, good morning.

MR. EDELSON: Good morning, Your Honor. Justin Edelson from Polsinelli for Honeywell.

THE COURT: Yes.

MR. EDELSON: We're here this morning on a consolidated hearing on the nine asbestos cases --

THE COURT: Right.

MR. EDELSON: -- that have been assigned to Your Honor. There are two agenda items today. It's Honeywell's motion for access to the 2019 exhibits and the Narco TAC motion to appoint an expert and referee.

I will cede the podium to Mr. Azman, from McDermott Will & Emery, who will handle the argument from Honeywell.

THE COURT: All right. Thank you.

MR. EDELSON: Thank you, Your Honor.

THE COURT: Should we have introductions? Does anyone want to make introductions first? Let's do that here, all right?

MR. AZMAN: Your Honor, Darren Azman, McDermott Will & Emery --

1 THE COURT: Yes.

2 MR. AZMAN: -- counsel to Honeywell.

3 THE COURT: Good morning.

4 MR. AZMAN: Also with me is my colleague, Megan
5 Preusker from Honeywell --

6 THE COURT: Good morning.

7 MR. AZMAN: -- or from McDermott.

8 MR. SINGEWALD: Good morning, Your Honor, Chris
9 Singewald on behalf of Ford Motor Company. With me is my
10 co-counsel, Elizabeth Sieg. Elizabeth is with McGuire Woods
11 firm in Richmond, Virginia.

12 THE COURT: Good to have you here.

13 MR. SINGEWALD: Thank you.

14 THE COURT: Thank you.

15 MR. KOVACH: Good morning, Your Honor, Tom Kovach,
16 A.M. Saccullo Legal. I'd like to introduce Kevin MacLay and
17 Todd Phillips from Caplin & Drysdale.

18 THE COURT: Good morning.

19 MR. MACLAY: Good morning, Your Honor.

20 THE COURT: Mr. Minuti, good morning.

21 MR. MINUTI: Good morning, Your Honor. Mark
22 Minuti from Saul Ewing. I'm here today for Owens Corning,
23 Your Honor. I rise just to introduce my partner, Adam
24 Isenberg.

25 MR. ISENBERG: Good morning, Your Honor.

1 THE COURT: Mr. Isenberg, welcome.

2 Mr. Harron, good morning.

3 MR. HARRON: Good morning to you, Judge Gross.

4 It's nice to see you.

5 THE COURT: Good to see you.

6 MR. HARRON: Thanks again for the accommodation of
7 moving today's hearing to today.

8 THE COURT: Absolutely.

9 MR. HARRON: I appreciate it so I could be here in
10 person.

11 THE COURT: Good.

12 MR. HARRON: For the record, Ed Harron from Young
13 Conaway for the Narco Future Claimants' Rep and the Flintco
14 Future Claimants' Rep. And with me today is my colleague,
15 Sharon Zieg.

16 THE COURT: Good morning. Good morning, Ms. Zieg.

17 MR. HARRON: Thank you, Your Honor.

18 MS. RAMSEY: Good morning, Your Honor, Natalie
19 Ramsey, Montgomery McCracken Walker & Rhoads for Waters
20 Kraus & Paul.

21 THE COURT: All right. Thank you, Ms. Ramsey.

22 MR. O'NEILL: Good morning, Your Honor.

23 THE COURT: Mr. O'Neill, good morning.

24 MR. O'NEILL: James O'Neill, Pachulski Stang Ziehl
25 & Jones appearing in the W.R. Grace case on behalf of the

1 reorganized debtors.

2 Your Honor, we filed a -- kind of a limited
3 response or objection --

4 THE COURT: Yes.

5 MR. O'NEILL: -- and we'll address that if it --
6 if we get to it.

7 THE COURT: All right.

8 MR. O'NEILL: Thank you.

9 THE COURT: All right. Thank you, Mr. O'Neill.

10 MR. MADRON: Good morning, Your Honor.

11 THE COURT: Good morning.

12 MR. MADRON: For the record Jason Madron --

13 THE COURT: Yes.

14 MR. MADRON: -- of Richards Layton & Finger
15 appearing on behalf of Armstrong World Industries and Kaiser
16 Aluminum Corporation, also two of the reorganized debtors
17 with closed cases.

18 THE COURT: All right. Thank you.

19 MR. MADRON: Thank you.

20 THE COURT: Thank you, Mr. Madron.

21 Ready for you now.

22 MR. AZMAN: Good morning again, Your Honor.

23 Darren Azman for the record, McDermott Will & Emery, counsel
24 to Honeywell.

25 Your Honor, when we last spoke about a month ago

1 Your Honor expressed a preference for moving forward first
2 with the access motions --

3 THE COURT: Yes.

4 MR. AZMAN: -- and then we turn to the referee
5 motion. Is that still the way in which Your Honor would
6 like to proceed?

7 THE COURT: That is the way I'd like you --

8 MR. AZMAN: Okay.

9 THE COURT: -- I'd like to have the argument.
10 And, you know, I'm kind of new to these cases. It would be
11 helpful to me if you gave me just a little bit of
12 background.

13 MR. AZMAN: Sure.

14 THE COURT: How we got to today.

15 MR. AZMAN: That is the first part of what I
16 planned on presenting --

17 THE COURT: All right. Good.

18 MR. AZMAN: -- to Your Honor.

19 THE COURT: Good.

20 MR. AZMAN: How we got here today. So let's start
21 with the 2019 orders that were entered in these nine cases
22 as well as a number of other asbestos cases over the years.

23 The orders were entered around 2004 and 2005 for
24 the most part --

25 THE COURT: Yes.

1 MR. AZMAN: -- and certainly in these cases that's
2 when they were entered. And what they asked parties to do
3 is it said all law firms who are representing personal
4 injury asbestos claimants in these nine cases need to file
5 statements pursuant to what was then Bankruptcy Rule 2019.
6 It's obviously changed over time.

7 THE COURT: Right.

8 MR. AZMAN: But what it was at the time.

9 And the statements were filed on the electronic
10 docket, the one or two pager, and the exhibit was filed off
11 of the electronic docket. The exhibits contained
12 information such as the first and last name of the personal
13 injury asbestos claimant, social security number, disease,
14 in some cases the settlement amounts, and it varied between
15 the cases and also varied depending on which law firm filed
16 a statement, but that's generally what was included on the
17 2019 exhibits that were filed off of the docket.

18 THE COURT: Okay.

19 MR. AZMAN: Now notably there was never any
20 finding made that these should be filed under seal. All
21 that was done at the time is that they put aside the issue
22 of whether it was appropriate to do it at the time or not
23 saving it for a later day, and that's pretty clear if you
24 look at a transcript from Judge Fitzgerald's comments as
25 well as later opinions that have looked at whether or not a

1 finding has ever actually been made.

2 Fast forward to 2013, Garlock Sealing
3 Technologies, a case that was filed in the Western District
4 of the North Carolina. In 2013 Judge Hodges, the presiding
5 judge in that case, held an estimation hearing --

6 THE COURT: Yes.

7 MR. AZMAN: -- to determine the current and future
8 liability for mesothelioma claims.

9 On the one hand Garlock argued that the total
10 amount should be around 125 million and the asbestos bar and
11 other parties argued that it's more like a billion or 1.3
12 billion, something in that range.

13 Judge Hodges permitted significant discovery in
14 that case in advance of the estimation hearing, and
15 ultimately it resulted in what we believe was a ground-
16 breaking decision that sent ripples through the asbestos
17 community.

18 Just quoting one thing from that case Judge Hodges
19 found a startling pattern of misrepresentation by asbestos
20 claimants.

21 Your Honor, this wasn't shocking to Honeywell, it
22 wasn't shocking to Ford, it really wasn't shocking probably
23 to any asbestos defendants who are involved in the tort
24 system. This is something that's been recognized for a long
25 time. Congressional reports have recognized the fraud that

1 exists, reputable newspapers, other media outlets such as a
2 Wall Street Journal, have conducted their own investigations
3 and reported on it. The unfortunate reality is that fraud
4 exists in the asbestos trust and asbestos tort systems.

5 Now as part of the significant discovery that was
6 permitted by Judge Hodges Garlock sought the 2019 exhibits
7 that were filed in these very nine cases. Garlock, as they
8 saw it, that was just one piece of the puzzle for being able
9 to demonstrate to Judge Hodges why the number should be
10 closer to 125 million.

11 As Your Honor is well aware now Judge Fitzgerald
12 originally denied Garlock's motion seeking access to the
13 2019 exhibits, and I'm sure Your Honor is also now familiar
14 with Judge Stark's opinion --

15 THE COURT: Yes.

16 MR. AZMAN: -- that reversed just about every
17 finding in Judge Fitzgerald's decision.

18 Your Honor, the 2019 statements were an integral
19 part of Garlock's arguments and the ultimate finding by the
20 court, and that is that fraud exists.

21 Now let's fast forward about a year later to late
22 2014. Honeywell and other parties, including Ford, sought
23 access to the 2019 exhibits that were filed in Garlock. Not
24 the ones that were filed in this case or any of these nine
25 cases, the ones that were actually filed in Garlock. We

1 were successful in doing that, and the order in that case
2 contained limitations that were designed to protect the
3 interest of asbestos claimants. And now those are the same
4 exact protections that we've included in the proposed order
5 that we submitted to Your Honor in connection with our
6 access motions in these cases.

7 Your Honor, notably each and every law firm that
8 serves as a member of the Narco TAC received notice of what
9 we did in Garlock. They received notice, they entered an
10 appearance, whether it was actual or constructive notice,
11 they knew what was going on. And although we didn't look
12 into every single lawyer that's in this room today to see
13 whether or not they had entered notice of appearance in that
14 case or whether they law firm did, I think it's fair to
15 assume that most or all of them had again actual or
16 constructive notice of what was going on.

17 So I'd ask Your Honor to consider the following
18 question. Why didn't a single lawyer in this courtroom at
19 that time object to what we were doing in Garlock, yet now
20 they're here today objecting to essentially what amounts to
21 the same exact relief? Say for maybe different information,
22 but the same exact type of information. Is it because they
23 didn't receive notice? No, they received notice as I just
24 said. Is it because the facts are any different in the
25 case? No, in fact Judge Stark has already ruled on the

1 exact same facts, that these 2019 exhibits should be
2 available to the public. Has the law changed? Not to my
3 knowledge.

4 You know what did change, Your Honor, is that
5 Honeywell sued the Narco trust in the Western District of
6 Pennsylvania as Your Honor is now well aware.

7 THE COURT: Yes.

8 MR. AZMAN: And we alleged that they violated a
9 number of provisions of the Narco trust agreement and the
10 TDP. And consistent with the recurring theme the Narco
11 trust constituents continued to find ways to impose costs on
12 Honeywell to deter or litigation efforts. That is the only
13 logical inference that you can draw if you look at the facts
14 and how things have played out over the past few years.

15 Your Honor, Honeywell has a number of significant
16 and legitimate reasons for seeking access to these
17 documents, both in connection with the Narco trust and in
18 connection with what we refer to as the Bendix litigation,
19 which is completely separate and apart from the Narco trust
20 matters.

21 We -- the arguments that were raised by the Narco
22 TAC in their objection, these are all recycled arguments, as
23 I'm sure Your Honor has now seen if you look at any of the
24 briefing that was done in those cases, and they've all been
25 flatly rejected by Judge Stark.

1 Now I know that we submitted a 30-page reply --

2 THE COURT: Yes.

3 MR. AZMAN: -- and I apologize that it was so
4 long, but we felt it was important to go through each and
5 every argument that the Narco TAC and other parties made to
6 show you exactly where, how, and why those arguments were
7 rejected. I'm not going to go through a recitation of those
8 arguments now, but there were a few things that I did want
9 to highlight for Your Honor.

10 Your Honor, the first is diverting. Whether under
11 the common law as articulated by the third circuit in
12 Publiker (ph) or under Section 107 of the Bankruptcy Code
13 there is a presumptive or statutory right of access to these
14 2019 exhibits. That is the default.

15 The TAC has the burden, and it's a significant
16 one, of demonstrating that an exception applies, and these
17 exceptions are to be applied sparingly. Specificity and
18 articulated reasoning are essential. Broad allegations of
19 harm such as the one that the TAC has made don't cut it.
20 Conclusory statements without any evidence whatsoever don't
21 cut it.

22 Second, Your Honor, let's take a look at the 107
23 exceptions. The TAC argues that several of those exceptions
24 are applicable. I want to put aside the legal deficiencies
25 for a moment. I'm happy to address them later, because I

1 think that they were already well briefed in all the
2 pleadings.

3 I think the TAC's argument as a practical matter
4 or as a logical matter it's understood cut by the very fact
5 that the information we are now seeking is part of a
6 complaint that you would file in state or federal court,
7 that information is never filed under seal. And the
8 character of that information doesn't change just because
9 it's now included in a 2019 exhibit.

10 So is counsel suggesting that asbestos plaintiffs
11 routinely subject themselves to identify theft or other
12 unlawful injury as would be required under the 107
13 exceptions in the tort system and then no one, including the
14 very same counsel that represents those parties in those
15 cases, has done anything about it? That makes absolutely no
16 sense.

17 Finally, Your Honor, some courts have held that
18 Section 107 under the Bankruptcy Code actually trumps or
19 supersedes the common law that congress indicated its intent
20 to do so because it passed such a provision. Under this
21 view only the specifically enumerated exceptions under
22 Section 107 are relevant. Either an expectation applies or
23 it does not. There's no weighing of the interests.

24 Your Honor, under either standard there has been
25 absolutely no evidence presented to the Court that would

1 justify keeping this information from the public. Honeywell
2 and other members of the public, such as Ford, have
3 legitimate reasons for seeking access to these documents.
4 And consistent with Judge Stark's well-reasoned opinion and
5 the orders entered by other courts, including Garlock by
6 Judge Hodges, Porter Hayden in Maryland, this Court should
7 not allow the Narco TAC and other constituents to protect
8 their own selfish interests in keeping asbestos fraud in the
9 shadows.

10 Your Honor, that's all I have. I'm happy to
11 answer any questions you have or --

12 THE COURT: I have some. I do have some here.

13 MR. AZMAN: Sure.

14 THE COURT: And does access depend on stating a
15 valid purpose? In other words, I know that your argument is
16 there is a presumptive right to access, but do you have to
17 come in and say here's why we want access to these
18 documents? You don't have to do that?

19 MR. AZMAN: No, our view, Your Honor, let's take
20 it in two different steps. You have the common law and then
21 you have Section 107.

22 THE COURT: Right.

23 MR. AZMAN: I'll start with that Section 107, then
24 I'll go to the common law.

25 Under Section 107 there are only specific

1 exceptions that apply and are either met or not. And the
2 Narco TAC, the parties seeking to keep those documents from
3 the public's eyes has the burden of proving that.

4 So as the movant seeking access Honeywell does not
5 have the burden of demonstrating what it intends to use --
6 what purpose it intends to use the 2019 exhibits for or
7 anything else, and that routinely occurs in cases where, you
8 know, the Wall Street Journal or the New York Times is
9 seeking access, they don't disclose necessarily what they're
10 doing. I mean the presumption is they're reporting on it,
11 but they might have other purposes for using that. But no,
12 our position is absolutely not, we do not have any burden to
13 show the Court why we need to use these statements.

14 But I think it's helpful to have some context.

15 THE COURT: Well it is because in -- in his
16 opinion Judge Stark was dealing with an estimation
17 proceeding. That was the purpose --

18 MR. AZMAN: Yes.

19 THE COURT: -- for which those documents were
20 sought and I think that Judge Stark dealt with that purpose.
21 Did he not?

22 MR. AZMAN: He addressed it, but he didn't -- that
23 wasn't the basis for his finding the way I read Judge
24 Stark's decision. He happened to address it because all of
25 the parties were objecting that the reason was improper,

1 just as is happening here, and that's the same reason why we
2 included significant argument in response to what our
3 purposes are, and we might have 50 other purposes for using
4 these statements. It's not just a three or four or five,
5 you know, legislative efforts like you mention, those are
6 not the only purposes. But it would be unreasonable to have
7 Honeywell come back to this court, especially if history is
8 any indication of the future with our dealings with the TAC
9 and other parties that are related to Narco, every single
10 time we have -- had a different use for them.

11 But I'd also note that Honeywell is a Fortune 500
12 company, this isn't some random company or person coming to
13 court asking for access to these exhibits.

14 THE COURT: But in his opinion Judge Stark limited
15 the use of the 2019 exhibits.

16 MR. AZMAN: He did, Your Honor, and if you look at
17 the transcript very carefully it's clear that nobody
18 objected to that. That's the key right there, nobody
19 objected to that use at all, including Garlock itself.
20 Garlock was under significant time constraints to get those
21 2019 exhibits so that it could present its argument to the
22 court --

23 THE COURT: Right.

24 MR. AZMAN: -- in advance of the estimation
25 hearing, and it didn't really care. It had no future use of

1 the 2019 exhibits. Contrasted with Honeywell we're an
2 ongoing company and we have significant uses for those 2019
3 exhibits.

4 THE COURT: Okay. The exhibits that you're
5 seeking --

6 MR. AZMAN: Yes.

7 THE COURT: -- access to, are they documents that
8 will in some way illustrate fraud?

9 MR. AZMAN: We believe so, Your Honor, and I will
10 caveat --

11 THE COURT: Tell me a little bit about them.

12 MR. AZMAN: I will caveat --

13 THE COURT: What do you think they have?

14 MR. AZMAN: I will caveat that my saying again we
15 do not think that we need to demonstrate -- if you had to
16 demonstrate whether the purpose for which you seek to use a
17 public document that you're seeking access to, if you had to
18 do that every single time you'd be having a trial on the
19 merits of the cause of action essentially. So I don't think
20 that we are required to demonstrate the likelihood of
21 success in that cause of action or even that we might have a
22 cause of action even if we only want to use these for
23 internal purposes of recordkeeping.

24 Our position is that we're entitled to access.
25 But I'm happy to elaborate on what the use might be.

1 THE COURT: Please.

2 MR. AZMAN: And I think the best example is the
3 one that we laid out in our reply. The statement that was
4 submitted by the Waters and Kraus law firm, that's just one
5 example, there are many that are like it where the law firm
6 is attesting under penalties of perjury that the clients
7 that are attached to that exhibit have claims against that
8 debtor in bankruptcy and may have claims against a trust.

9 Now is that definitive proof that we now have a
10 claim for something? No, of course not, that's why we
11 haven't filed a lawsuit against anybody at this stage, we're
12 just seeking access to the documents, but that's one piece
13 of the puzzle just as Garlock saw it.

14 And if you look at the exhibit that was attached
15 to our reply, there were several, one of them was a trial
16 exhibit --

17 THE COURT: Right.

18 MR. AZMAN: -- that Garlock submitted, which if
19 you read through even just a couple of those examples, which
20 are the 15 individuals over whom Garlock was permitted to
21 obtain discovery, it's pretty scathing in terms of the fraud
22 that was perpetrated in terms of who they asserted claims
23 against, but in tort against Garlock they never even
24 disclosed it.

25 So that's exactly what we think we'll be able to

1 use it for, and certainly Garlock was successful. Parties
2 were arguing that their liability was a billion dollars and
3 Judge Hodges found 125 million was really the closer number.

4 THE COURT: Okay. How about privacy concerns, the
5 privacy of those people who submitted the 2019 --

6 MR. AZMAN: Absolutely.

7 THE COURT: -- information?

8 MR. AZMAN: Privacy is very important here. We
9 acknowledge that. But the constraints that we have placed
10 on the disclosure of these 2019 exhibits are the same exact
11 restraints that were placed on it by Judge Hodges and the
12 same exact restraints that were placed on it when we sought
13 access to the Garlock 2019 exhibits. There's nothing more.
14 We are going to redact the five -- the first five digits of
15 social security numbers, the retention agreements which the
16 Narco TAC complains about. We've never asked for them, Your
17 Honor, nobody has asked for them in the past so we're not
18 asking for them now. We thought we'd make it easy.

19 Frankly, Your Honor, we're a little bit surprised
20 as to why this is so contention given there's so much law
21 that's already been decided in these cases specifically.

22 But no, we think we've adequately addressed any
23 privacy concerns, especially given, as I said before, that
24 this is the same type of information that a claimant -- an
25 asbestos claimant would need to put in a state or federal

1 court complaint. It's information that was already
2 disclosed to some extent in a number of fashions.

3 For example, almost all of the estimation hearing
4 materials were unsealed by the Garlock court. I'm not just
5 talking about the 2019 exhibits. One of the examples we
6 gave, which is one of many, are the ballots that were
7 submitted in these cases.

8 THE COURT: Right.

9 MR. AZMAN: I think Armstrong is the only
10 exception, but just to be clear. But in eight of these nine
11 cases the ballots were disclosed, and I know that the Narco
12 TAC makes the argument about well disclosure of information
13 in one form is a little bit different than allowing somebody
14 to create a telephone directory. Well guess what, that's
15 already been done. Look at the way that they list
16 everything on the ballots. It's already there.

17 So it's hard for us on this side of the podium to
18 fathom why there's such a contentious debate over these, but
19 here we are and that's how -- that's our position in terms
20 of whether we need to explain what our use is for the 2019
21 exhibits.

22 THE COURT: All right. How do we remove
23 information that Honeywell is not seeking? The social
24 security numbers, the retention agreements. Who's going to
25 do that?

1 MR. AZMAN: Well, Your Honor, Karl Schieneman I
2 believe is his name, was the special master who was
3 appointed when Garlock original sought access to the 2019
4 exhibits in these cases. Karl and his team did what I
5 understand to be quite a good job. It was a laborious job,
6 but they did it in redacting all of the social security
7 numbers and they certified that everything was done
8 according to the court's order, including redaction of the
9 retention agreements and anything else that we'd included.

10 Now, Mr. Schieneman did reach out to me yesterday
11 or the day before asking if he thought it made sense to
12 attend this hearing telephonically in case the Court had any
13 questions on that. I don't know if Mr. Schieneman is on the
14 phone, but if Your Honor had any questions for him and he is
15 on the phone I'm sure he'd be happy to answer them in terms
16 of how the work was done and the fact that it exists in the
17 clerk's office of the Western --

18 MR. SCHIENEMAN: Yes, Your Honor, this is Karl
19 Schieneman, I am on the phone and happy to answer any
20 questions you might have.

21 THE COURT: Have you -- do you have a set of these
22 exhibits already redacted and with retention agreements
23 removed and the like?

24 MR. SCHIENEMAN: We don't -- we didn't -- we were
25 under a strict confidentiality order when handling this

1 material, and we were ordered to destroy and return the
2 material that we had worked on. You know, we submitted one
3 set to the Garlock claimants and then we sent one set back
4 to the court in the Western District of Pennsylvania
5 Bankruptcy Court to retain.

6 And, you know, the interesting thing that wasn't
7 discussed in this entire process we did is how we would tell
8 people what we did because we had a confidentiality order,
9 and I've talked to the Western District of Pennsylvania and
10 the court and they've agreed that I should be able to
11 explain what -- you know, what we did, how we accomplished
12 it, and how we protected the confidential nature of the
13 information. That court was very happy with the process we
14 did and the efficiency and the economic end result and the
15 fact that the information was protected.

16 So I can explain what we did if you'd like, but
17 I --

18 THE COURT: Yes. Yeah, please do.

19 MR. SCHIENEMAN: Okay. So we had -- we were
20 supplied with hand copies of all the 2019 agreements and as
21 well as the retention agreements. I think there was a total
22 of 1.3 million pages if memory serves me. We used a tool --
23 a visual clustering tool that enabled us to group similar
24 types of documents together, and when we found a social
25 security imprint we were able to understand, even though the

1 scanned or partially scanned, because these are all records
2 that entire pile was (indiscernible) social security number
3 as that same file.

4 People have asked if we were able to do 1.3
5 million pages of redactions for what would have manually
6 taken an army of 89 people to do in the two months we had.
7 We did it with 11 review attorneys around the country. They
8 placed the redactions, we had a QC process, we entered into
9 a claw back agreement with Garlock that if anything slipped
10 through it would be returned to us. And in about six weeks
11 -- five, six weeks we completed the task.

12 I would not -- the reason I'm on this call was I
13 anticipated there might be questions, I figured it might
14 help short circuit the process if I made myself available.
15 I would not suggest because the work has already been done
16 that the work be redone. But what we didn't get a chance to
17 do under the incredible time pressures we had was make sure
18 that the redaction was actually on every single document
19 (indiscernible). We did some judge panel sampling
20 basically.

21 And I would suggest if were we to undertake this
22 effort again that we would just potentially review what had
23 already been produced and made sure, because no one has done
24 that, that scan is in place, and doing the clean up that was
25 necessary. And that would be even less of an economic

1 burden.

2 I think the economics of that review, not my time
3 as special master, but the time of the review is somewhere
4 in the \$60,000 range, instead of costing over a million
5 dollars doing it the traditional way. So it was very cost
6 effective.

7 THE COURT: And -- but you would have to start
8 from scratch here; is that correct?

9 MR. SCHIENEMAN: No. What the court in the
10 western district has told me is they were comfortable --
11 they don't -- they didn't have the manpower to do this
12 before and it's not what they do, so they would be
13 comfortable turning over what we turned over, you know,
14 because we've kept it confidential in Garlock, what we did
15 then so that we could potentially check it and make sure
16 that the same confidentiality provisions that were in place
17 in Garlock or in place in this case, because they are
18 obviously very concerned about the fact that this
19 information was filed under seal, and I don't want to speak
20 for the court, but I have a strong sense they would like
21 that process to be followed again and they'd be comfortable
22 if it was followed again, you know, using the same process.

23 And so it was a work product we had already done
24 and potentially check it to make sure it -- the seals were
25 in place. We -- you know, we would have the technology

1 available that we used before to do any clean up.

2 THE COURT: All right. And that would be -- now
3 in the Western District of Pennsylvania you were dealing
4 with how many cases?

5 MR. SCHIENEMAN: Twelve -- 12 of these cases.

6 THE COURT: And here it would be nine of these
7 cases?

8 MR. SCHIENEMAN: How many cases are in it I'm not
9 familiar with --

10 THE COURT: It's nine, yes. It's nine.

11 MR. SCHIENEMAN: Yes.

12 THE COURT: Okay. All right. If you'll just
13 remain on the phone in case people have questions that would
14 be helpful, Mr. Schieneman.

15 MR. SCHIENEMAN: Thank you, Your Honor.

16 THE COURT: Thank you.

17 You want fairly broad use of these documents.

18 MR. AZMAN: We do. The same use that we got in
19 Garlock when we sought access. The same use we got in --

20 THE COURT: Well in Garlock you got the right to
21 use the documents --

22 MR. AZMAN: For any --

23 THE COURT: Oh, I'm sorry, out of --

24 MR. AZMAN: When Honeywell and Ford and others got
25 the right to use --

1 THE COURT: In North Carolina.

2 MR. AZMAN: And again, everyone in this room had
3 -- I'll speak at least about the Narco TAC because of the
4 movants. They had notice. Why are they here now objecting
5 to the same relief? It doesn't make any sense. It's the
6 exact same order. If there are any nuances we're happy to
7 conform them. I'll represent that, but I believe that
8 they're exactly the same.

9 THE COURT: Okay. The order that you propose
10 provides any entity including Honeywell.

11 MR. AZMAN: Yes, anyone in the public, that's
12 exactly what we got before. It's not just Honeywell we're
13 talking about. As the supreme court and other courts have
14 recognized the idea that papers in bankruptcy cases and in
15 other courts should be public it's a fundamental right. It
16 fosters especially in mass tort cases. It fosters the
17 truth, and that's what we're trying to get here.

18 Now we're not saying they have to set up a website
19 and make it available for all to see on Google, and
20 Honeywell certainly has no intention of doing that, but it's
21 publicly filed documents that should be available.

22 THE COURT: Well I understand Honeywell is seeking
23 the documents and I understand Ford is seeking the
24 documents. Why shouldn't the order be restricted to
25 Honeywell and Ford?

1 MR. AZMAN: Your Honor, that's something we'd be
2 willing to consider.

3 THE COURT: All right.

4 MR. AZMAN: But let me be clear, when we say
5 Honeywell and Ford we work with many people. We have third
6 parties that we need to provide them to, and that's not
7 something we're going to -- and Ford may not have -- Ford
8 may not be amenable to that. But I don't think that there's
9 any reason why it should be restricted only to Honeywell and
10 Ford.

11 THE COURT: Well doesn't Judge Stark in his
12 opinion make it clear that its parties who request access to
13 these documents?

14 MR. AZMAN: I'm not sure that he absolutely says
15 that that's the way it works. I think that if a document is
16 to be made public it's to be made public, it doesn't just
17 get -- you're still sealing the document. But if you're
18 restricting access only to certain people such as Honeywell
19 and Ford there has to be a basis for that finding under 107,
20 one of the exceptions. Like I said before, there's no
21 weighing of the interest and limiting the order. If you can
22 find an exception that applies then maybe there's, you know,
23 some consensual arrangement that the parties would agree to.
24 But there's no exception that applies here. It's either --
25 needs to be made available to public or not, and like I

1 said, there's no argument that any of the exceptions apply.

2 THE COURT: All right.

3 MR. AZMAN: So I don't think that you can just
4 limit it to just Honeywell and Ford if you're going to find
5 that none of the exceptions apply.

6 THE COURT: And you want to use these documents in
7 lobbying efforts and the like.

8 MR. AZMAN: That's one example, yes.

9 THE COURT: All right. Who should bear the cost
10 of Mr. Schieneman, for example?

11 MR. AZMAN: Well that's something that we've
12 discussed. Obviously Your Honor is aware that two of the
13 reorganized debtors have filed limited objections and that's
14 exactly what they've asked about.

15 THE COURT: Right.

16 MR. AZMAN: And it's our position, if you look at
17 107, it says that public documents shall be -- does anyone
18 have -- do you have a copy of that --

19 THE COURT: It does say without cost.

20 MR. AZMAN: Without cost, Your Honor.

21 THE COURT: Yeah.

22 MR. AZMAN: If these documents are public they're
23 public and they need to be made available without cost.

24 So --

25 THE COURT: Well but there is cost involved here.

1 It's not because of the way the exhibits are --

2 MR. AZMAN: Yes, but --

3 THE COURT: -- arranged.

4 MR. AZMAN: -- the reorganized debtors that are
5 here complaining today about the cost were involved in the
6 case ten years ago. We were not. That was their doing and
7 the court's doing and the parties' doing and that they
8 created this cost is not our problem. We're seeking access
9 to these as publicly available documents. If we're entitled
10 to access them then we're entitled to access them and we
11 shouldn't have to bear the cost.

12 THE COURT: All right. All right. Those are my
13 questions for know.

14 MR. AZMAN: Thank you, Your Honor.

15 THE COURT: Thank you.

16 MS. SIEG: Good morning, Your Honor.

17 THE COURT: Good morning.

18 MS. SIEG: Beth Sieg at McGuire Woods for Ford
19 Motor Company.

20 THE COURT: Yes.

21 MS. SIEG: We are also seeking public access to
22 the 2019 exhibits that have been filed in these nine cases,
23 and I want to emphasize at the outset again that Rule 2019
24 is a disclosure rule. The purpose of the rule is to provide
25 transparency about which creditors are participating in a

1 bankruptcy case. Creditor identity is not a confidential
2 matter. Every day, Your Honor, creditors are participating
3 in your courtroom saying what their names are and what their
4 claims are. And Rule 2019 is a rule that's designed to
5 foster that kind of disclosure so that the public and
6 parties in interest can see who's participating in a
7 bankruptcy case.

8 Now, Your Honor, I would point to a case that we
9 cited in some of our papers, the Company Doe decision out of
10 the fourth circuit very recently, and that court held that
11 the public has an interest in knowing the identity of
12 litigants in cases. That is part of the right of public
13 access is to know who's participating in federal courts and
14 state courts for that matter.

15 THE COURT: But weren't these exhibits -- wasn't
16 access to some extent restricted to parties who requested
17 the access?

18 MS. SIEG: Your Honor, I don't agree with that
19 interpretation of how it was set up. You know, what the
20 district court decision said is this was a mechanism, a
21 protocol for handling the filing, here's how we're going to
22 receive these. We will decide public access issues later.

23 THE COURT: Okay.

24 MS. SIEG: So I don't think that it was set up as
25 a determination that access should be restricted in some

1 way, held off the public docket, never disclosed to the
2 public, or if disclosed only disclosed to selective parties
3 with a prior restraint contrary to First Amendment on their
4 ability to dues and disseminate the information that they
5 received as part of that access.

6 So no, I don't think that that is an issue that
7 has been determined by the structure of these orders, and
8 there's certainly no binding precedent or rule that would
9 prohibit Your Honor from granting public access now that it
10 is fully before Your Honor to decide.

11 THE COURT: And that's what the order provides,
12 any party, including Honeywell and Ford.

13 MS. SIEG: Yes.

14 THE COURT: So you would want that language to
15 remain as it is and not be restricted to Honeywell and Ford.

16 MS. SIEG: That's correct, and for good reason,
17 Your Honor. If the order were restricted to Honeywell and
18 Ford that would constitute a prior restraint on speech. We
19 have cited to Your Honor all of the case law on that issue
20 and Ford's joinder that was filed on September 20.

21 Your Honor, if these are documents that the public
22 is entitled to access it would violate the First Amendment
23 to instruct Ford and Honeywell that only they get access.
24 That's effectively prohibiting our ability to use these
25 documents under our free speech rights under the First

1 Amendment.

2 Your Honor, I would point out again, as Mr. Azman
3 has said, the exceptions to 107 are construed narrowly --

4 THE COURT: Yes.

5 MS. SIEG: -- they require evidence to demonstrate
6 that they are applicable, and that has not been done here.
7 There is no risk of identity theft in the form of the order
8 that we have proposed, because it includes the usual
9 redactions that are required under Bankruptcy Rule 9037.

10 And I will note Mr. Azman went over this about the
11 inconsistency with the Narco TAC's position here and all of
12 the prior orders that have been entered in other courts on
13 these 2019 access issues, and I will represent to Your Honor
14 that I personally negotiated the Garlock 2019 access order
15 with Mr. Kevin Maclay, and that order was designed
16 specifically to allow broad public access to Rule 2019
17 statements and that's exactly what we're seeking here.

18 THE COURT: And the order is virtually the same in
19 this case as was entered in Garlock?

20 MS. SIEG: Yes, it is. And I'll echo Mr. Azman
21 that if it isn't we're certainly willing to make whatever
22 changes are necessary to match it up to that order. We
23 tried to make sure that we did that, you know, adjusting for
24 case captions and things.

25 Your Honor, I would like to emphasize in answering

1 one of the questions that you asked of Mr. Azman is our
2 purpose relevant? No, it isn't, and we've cited case law to
3 that effect. It's the (indiscernible) Capital case and the
4 Father M. case in all of the papers. Congress has codified
5 what policies override the public access interest. Those
6 appear in 107. If one of those doesn't exist then congress
7 has said the public has a right of access at no cost.

8 THE COURT: But didn't Judge Stark address purpose
9 in his opinion?

10 MS. SIEG: The purpose that Garlock sought these
11 2019 statements for was --

12 THE COURT: Yes.

13 MS. SIEG: -- to find out who asserted claims in
14 these cases.

15 THE COURT: Right.

16 MS. SIEG: That was what Garlock wanted to do.

17 THE COURT: And to be used in the estimation
18 proceeding and then to be destroyed -- the documents to be
19 destroyed.

20 MS. SIEG: And, Your Honor, the key difference
21 between Garlock and Ford and Honeywell, Garlock was in a
22 Chapter 11 --

23 THE COURT: Yes.

24 MS. SIEG: -- knowing that it is seeking a
25 channeling injunction for all of its asbestos liability.

1 What other purpose would it ever possibly have? So the fact
2 that Garlock would consent to prior restraints on its own
3 use isn't determinative of whether Ford and Honeywell should
4 be subject against their will to such prior restraints.
5 They're just in very different positions. And really the
6 purpose for which we're seeking it is not relevant under
7 107, but it is a legitimate purpose.

8 As the Garlock estimation opinion revealed knowing
9 the identity of creditors who are asserting claims in
10 bankruptcy cases is important. These Rule 2019 exhibits
11 will not in and of themselves demonstrate that fraud
12 occurred, but what it will demonstrate is who asserted
13 claims in these cases. That's what they assert, that is
14 what Rule 2019 requires disclosure of. And, Your Honor, we
15 think that there's really just not been a sufficient showing
16 to overcome the public right of access.

17 And again, I'll point Your Honor to the Company
18 Doe decision that every passing day that these documents
19 aren't made available to the public is a separate injury to
20 the public access rights. So we urge Your Honor to act
21 swiftly and grant public access to these documents.

22 THE COURT: How about privacy concerns and the
23 medical records? This goes beyond the names and social
24 security numbers or the four digits of the social security
25 numbers, this goes to, for example, family history.

1 MS. SIEG: Your Honor, that I do not -- not having
2 seen the exhibits myself I can't gauge the accuracy of
3 whether they do include medical information. I know that we
4 are not seeking any kind of medical documents. I don't
5 believe that the Rule 2019 orders required submission of
6 such information.

7 To the extent it's in there we don't want it and
8 we agreed to that limitation in the Garlock estimation trial
9 record.

10 And as to the other privacy concerns, again,
11 there's a bankruptcy rule that describes how we protect
12 those interests, it's Rule 9037, and our proposed order
13 embodies those same protections.

14 And again, I'll point Your Honor to some of the
15 case law that we cited in both the Honeywell joinder and I
16 believe the Honeywell reply which shows, you know, if you
17 are an objector who's proposing secrecy you have to come
18 forward with specific evidence to show that there is a risk
19 of identity theft, and that takes a vulnerable account and a
20 -- and identity thief, and you have to do that with
21 evidence. There's no evidence that there is an undue risk
22 of identity theft just by allowing the public to know the
23 names of creditors in these bankruptcy cases.

24 So to the extent that this information does
25 include things like medical histories, we certainly don't

1 want those and I don't believe that they should have been
2 submitted in the first place.

3 Now, I will make one caveat. I believe that the
4 2019 orders do require that the creditor specify which
5 asbestos related disease they have.

6 THE COURT: Yes.

7 MS. SIEG: That's not confidential, that's the
8 same kind of thing that you would put in a public complaint
9 filed in the tort system. So we would not agree to -- that
10 the disease type should be redacted, but any kind of medical
11 history we're not interested in that.

12 THE COURT: All right. All right. Thank you.

13 MS. SIEG: Thank you, Your Honor.

14 THE COURT: Thank you.

15 MR. MACLAY: Good morning, Your Honor.

16 THE COURT: Good morning, sir. How are you?

17 MR. MACLAY: I'm doing Well. I'm Kevin Maclay,
18 we're representing --

19 THE COURT: Yes.

20 MR. MACLAY: -- the Narco TAC this morning.

21 THE COURT: Yes.

22 MR. MACLAY: Your Honor, as was noted earlier
23 today the Narco TAC did not file a surreply deciding to save
24 its fire, so to speak, for today's hearing. But because of
25 that I will be going beyond some of the comments made here

1 today to address some of the comments made in the reply
2 brief, which the Narco TAC believe to be inaccurate.

3 But a couple of quick background facts. As Your
4 Honor knows I'm here representing the Narco TAC.

5 THE COURT: Right.

6 MR. MACLAY: The Narco TAC is charged with
7 representing the interest of the asbestos victims in a
8 fiduciary capacity that have Narco trust claims and so
9 that's obviously the capacity which I'm here today.

10 You have heard, Your Honor, that many of the
11 arguments here kind of relate to wanting to take what the
12 movants like about Judge Stark's decision and disregarding
13 what they don't like about it, and I think it's very
14 important to take a step back and realize what his decision
15 did not permit Garlock to do.

16 It did not permit Garlock to use this information
17 in any way against the individuals whose information was
18 being provided. It could only be used in the aggregate in
19 Garlock's estimation trial. Garlock could not have used
20 this in lawsuits against individuals. It could not have
21 used it in lobbying efforts naming the individuals. It
22 could not use it in lobbying efforts whatsoever. Those uses
23 were precluded by Judge Stark.

24 THE COURT: But the -- but Honeywell and Ford
25 argue that Garlock was under some kind of time constraint

1 and perhaps didn't urge Judge Stark beyond where he went.

2 MR. MACLAY: Well if you look at Judge Stark's
3 decision, Your Honor, he himself noted that they had
4 multiple purposes. In his decision he noted first of all
5 they had the purpose, as we've discussed here today, in
6 using them in the estimation proceeding. He also noted that
7 they wanted to use them in a potential RICO action. And he
8 also noted they wanted to use them in lobbying efforts.
9 Those were both perfectly capable of being pursued during
10 Garlock's bankruptcy. And of course there's no one that can
11 say here that Garlock would definitely have emerged from
12 bankruptcy. It could have had to dismiss the bankruptcy.
13 And so the option of tort actions always existed for
14 Garlock, Your Honor.

15 But yet Judge Stark said, no, you can't use it for
16 any of that stuff. And Garlock never agreed to any of those
17 particular restrictions. Garlock made a general comment
18 oral argument that they would be open to tailoring to some
19 restrictions, and then Judge Stark imposed the restrictions
20 that he thought were necessary and appropriate under the law
21 and under the facts.

22 And so for anyone to tell Your Honor that Garlock
23 agreed to not use it in a tort action, that Garlock agreed
24 to not use it in lobbying efforts it's just not supported by
25 the record and it certainly -- Judge Stark's decision was

1 not contingent upon any sort of agreement. You can just
2 read the decision. That's the decision, it speaks for
3 itself. No contingency on Garlock's agreement.

4 With respect to -- so that's kind of a fundamental
5 point here, Your Honor. Given that Judge Stark's view of
6 the privacy interests here was that those privacy interests
7 to be protected adequately had to preclude the use by
8 Garlock of individual attacks on these individual elderly
9 and sick victims of asbestos, many of whom are no longer
10 represented.

11 Your Honor, to be consistent with that ruling, if
12 it were to enter any sort of order providing any sort of
13 use, should preclude that kind of use, and that's something
14 that neither of the movants here today is frankly
15 acknowledging to Your Honor, what Stark's restrictions
16 actually were and what they would mean if applied here.
17 Your Honor, I think most likely what they would mean is that
18 they shouldn't get them at all, because their express
19 purposes are things that Judge Stark did not permit.

20 And with respect to whether or not they need a
21 purpose, Your Honor, we've addressed this in our briefing,
22 I'll touch on it a little bit later, but I would just like
23 to mention something that apparently the other side has
24 forgotten from the transcript of Judge Stark's decision in
25 addition to as Your Honor pointed out the fact that he in

1 fact analyzed Garlock's purpose in his decision.

2 On page 29 of the transcript of that oral
3 argument, Your Honor, Judge Stark asked the following
4 question. "But in this case you have an order that was
5 approved by the third circuit and not appealed by you and
6 not an issue in this appeal."

7 THE COURT: Right.

8 MR. MACLAY: It says you need to file a motion in
9 order to get access. "So given that don't I have to access
10 your motion and the purposes for which you are seeking
11 access?" That question I think underlies the court's
12 conclusion, Your Honor, that Garlock couldn't use it for its
13 other expressed purposes, and their argument that Garlock
14 was under time pressure is frankly neither here nor there.

15 With respect to this --

16 THE COURT: And those were prior decisions even of
17 the third circuit which --

18 MR. MACLAY: That's correct, Your Honor.

19 THE COURT: -- which affirmed Judge Fitzgerald's
20 rulings.

21 MR. MACLAY: It confirmed the process.

22 THE COURT: Yeah.

23 MR. MACLAY: Absolutely. And that process remains
24 in effect and it was also subsequently addressed by the
25 Kaiser district court and then subsequently addressed by

1 Judge Stark himself.

2 So at this point, Your Honor, I don't think it
3 really should even be open to them to argue with any degree
4 of credibility that Your Honor should just open them up to
5 public view from any sort of restriction. We have a
6 process, it's been approved multiple times, it should be
7 followed, it requires a motion, and undercuts the theory of
8 their access in the first place, which is why they
9 ultimately shouldn't be given access at all.

10 You heard frankly a lot of irrelevant arguments
11 about another case and how fraud was allegedly shown in that
12 case. I'm not going to get into that too much, Your Honor,
13 it's really neither here nor there either, but I will just
14 note just to clarify a couple points they said.

15 The GAO had looked -- has looked into the
16 allegations of fraud in the trust system and the GAO
17 concluded there was no fraud, the non-partisan GAO. The
18 house minority report very recently who also concluded
19 unanimously there was no fraud then.

20 And that's all I'm going to say about it just to
21 note this background that these Fortune 500 companies would
22 like Your Honor to buy into is certainly at a minimum open
23 to reasonable dispute and should not be the basis for any
24 decision by Your Honor.

25 You heard that in another case there were -- there

1 was a consent order entered that provided broader access
2 than what the Narco TAC is arguing should be restricted to
3 here today. And as we put it in our brief, Your Honor,
4 first of all as a fundamental legal matter those consent
5 orders are irrelevant. The law is clear that consent orders
6 have no presidential event. So that's the primary argument
7 right there, Your Honor, it doesn't matter.

8 When they try to get Your Honor to rely on a
9 consent order in another case with different parties doing
10 different things they're asking Your Honor to draw a legally
11 insupportable conclusion.

12 And secondly, Your Honor, obviously in the Garlock
13 case there are a lot of other things going on. I cannot
14 represent to Your Honor the Narco TAC had any knowledge of
15 what was going on in the Garlock case much less about these
16 2019s. And for them to suggest to the contrary is just
17 again unsupported.

18 To the extent Your Honor feels that there are any
19 factual issues that need to be developed with respect to the
20 2019 proceedings obviously we'd have to have further
21 proceedings to look into those facts.

22 I know we had an unexpected witness here today
23 with Mr. Schieneman, and if there anything -- if there are
24 any other issues like this that Your Honor feels need
25 clarification we would need to explore them. And there are

1 a couple of other issues that I think we would need further
2 proceedings about, that I'll get to a little bit later on.

3 So you have heard today, Your Honor, you have
4 heard Honeywell acknowledge who wants to use these 2019s in
5 tort litigation what they term the Bendix litigation. Well
6 that's exactly what Judge Stark didn't permit, Your Honor.

7 THE COURT: I don't know much about the Bendix
8 litigation other --

9 MR. MACLAY: I know it's tort actions against
10 individuals, Your Honor.

11 THE COURT: Okay.

12 MR. MACLAY: And that's the key. Because Judge
13 Stark restricted this information for use in a bankruptcy
14 estimation to be used in the aggregate. No individuals
15 could be sued, no individuals could have their information
16 published. Their names couldn't even be published.

17 So when you hear the movants tell you that this
18 information isn't really confidential, names and social
19 security numbers or portions of them don't need to be
20 protected by you, that's certainly in direct contravention
21 of Judge Stark's own ruling. And so just keep that in mind,
22 when they make that argument what they're really saying
23 surreptitiously is don't do what Judge Stark did even though
24 on the face that they raise they say follow what Judge Stark
25 did.

1 If you follow what Judge Stark did you will not
2 allow this information to be used against these individual
3 elderly sick asbestos victims. And as has been acknowledged
4 by the movants these documents include social security
5 numbers and medical records.

6 THE COURT: What would you have me do here?

7 MR. MACLAY: Well let me divide that -- that's an
8 excellent question, Your Honor, let me divide it into two
9 parts if I could.

10 I think what I would really want Your Honor to do,
11 based on what we've heard about their purposes, I'd like
12 Your Honor to say I have to evaluate your purposes, I have
13 some information from Judge Stark's decision about what
14 would and wouldn't be an appropriate use of these documents,
15 your proposed use is inconsistent with those restrictions,
16 and you should not get them. That I think, Your Honor, is
17 the best answer to the question.

18 If Your Honor felt like you had to provide some
19 access for some reason that isn't clear to me at the moment,
20 then Your Honor, I think you would need to analogize your
21 reasoning as closely as possible to what Judge Stark did.

22 What Judge Stark did, among other things, was only
23 provide the information subject to a protective order issued
24 by a subsequent court in a very specific proceeding.

25 THE COURT: Correct.

1 MR. MACLAY: So, for example, although it
2 certainly wouldn't be what I think Your Honor should do, if
3 Your Honor were to issue an order saying I'm going to
4 release subject to all sorts of restrictions that we can
5 talk about in more detail in a minute because they're very
6 important, to -- for use in the trust processing dispute
7 that's pending in the Western District of Pennsylvania
8 subject to a protective order to be issued by that court and
9 only for use in that proceeding that would be something more
10 analogous to what Judge Stark did, although I think it would
11 go beyond what he did too, because it would relate to
12 individuals and not just aggregate information, but
13 precluding the use that he also precluded in terms of what
14 they say they want to do just for lobbying and precluding
15 what they said they want to do with respect to tort actions.

16 And keep something else in mind, they've
17 acknowledged here that they have 40 or 50 other purposes.
18 Well, Your Honor, if you have to evaluate --

19 THE COURT: Well they want me to open it up to any
20 member of the public.

21 MR. MACLAY: Oh, they do, Your Honor, and that is
22 of course blatantly inconsistent with every prior ruling in
23 this case -- in these cases.

24 But more fundamentally, Your Honor, think about
25 this, if Your Honor is required to evaluate their purposes,

1 and we are telling you that you are, not just under the
2 common law or 107, but under the prior orders which are not
3 subject to collateral effect here, how can you do that when
4 they have hidden purposes that they haven't chosen to
5 elaborate for Your Honor? How can you open up to the public
6 when who knows how many identities -- they said there has to
7 be an identity thief. Well you know what, Your Honor, I
8 know one thing about identity thieves they exist, and if you
9 open up to every one in the world well guess who's getting
10 access to it, Your Honor, identify thieves. It's pretty
11 obvious.

12 And so if you have to evaluate purpose, as we
13 believe that you do, you can't give it to people with hidden
14 purposes and you can't give it to people that are unknown.
15 It just isn't consistent with the legal framework that's
16 been set up and approved multiple times in these same cases.

17 One factual point, Your Honor. You asked how
18 these exhibits show fraud and what you were basically told
19 in response is well they showed fraud in Garlock. So let me
20 just make a couple of points that Your Honor may or may not
21 be familiar with.

22 The decision issued by Judge Hodges never
23 mentioned 2019s, and there were some 2019s that were
24 provided to Judge Hodges which he apparently didn't rely on
25 from discovery efforts. But the 2019s produced on loss from

1 these cases were never used by Judge Hodges because they
2 were never put into evidence, they never was used at all in
3 the estimation. And so the argument that they show fraud,
4 look what happened in Garlock therefore we should get the
5 same information, those documents weren't even admitted,
6 they weren't used, they weren't relied upon. And so that's
7 just a false argument.

8 What we do know -- oh, one other thing. They say
9 everything in here is already in the ballots that were
10 produced and made public in Garlock. Well, Your Honor, if
11 everything that was in here was actually already produced in
12 the ballots in Garlock this entire exercise would be a
13 frivolous one. It would be a waste of court resources, it
14 would be an improper intrusion for no basis whatsoever into
15 the privacy. If you believe what they say you should close
16 down this exercise on that basis alone. They've got
17 everything they say they need, Your Honor, take them at
18 their word, shut this down, don't allow them to misuse this
19 process and impose burdens upon the courts and the debtors
20 of reviewing what Mr. Schieneman has said previously are
21 over one million pages -- I think he said 1.3 million
22 earlier today --

23 THE COURT: Yes.

24 MR. MACLAY: -- over 3300 CDs, over 200,000
25 documents. It's a massive exercise. Mr. Schieneman doesn't

1 have the documents anymore.

2 You were told that other courts might, and I'll
3 get to that again in a minute, but Your Honor, if other
4 courts have the documents that they need why are they here?
5 If they think the Western District in North Carolina has
6 these documents why aren't they there? If they think the
7 Western District of Pennsylvania has the reduced set that
8 should then be further worked on why aren't they there? Why
9 are they just here? They can't get the fulsome relief they
10 seek from Your Honor any way without massive expenditures,
11 which are not justified by their very thin basis for
12 requesting these documents in the first place.

13 And, Your Honor, just as a matter of procedure
14 you've heard an argument here from Ms. Sieg about First
15 Amendment and how allegedly restricting these documents in
16 any way would constitute a prior restraint, besides the fact
17 it's obviously inconsistent with what Judge Stark did. It's
18 also an argument that only came up in one place in this
19 briefing, and that is in the brief you allowed Honeywell to
20 file with respect to conflict issues potentially held by
21 Judge Fitzgerald, and Ford used that as an excuse to throw
22 in a completely new argument that we obviously haven't had a
23 sufficient chance to respond to.

24 So if you place any credence whatsoever into the
25 constitutional arguments, and I'll explain in a minute Your

1 Honor why I think they're frivolous any way, that would
2 again require a further process. You can't sandbag your
3 opponent, Your Honor, by throwing in a constitutional
4 argument in a brief that isn't even supposed to be about
5 that without court permission. That's just not appropriate
6 and I'm sure Your Honor wouldn't permit it.

7 Now with respect to -- oh, one quick question for
8 Your Honor procedurally. Would you like me to blend into my
9 argument the arguments about Judge Fitzgerald or would you
10 like me to save that for a subject --

11 THE COURT: Let's save those arguments.

12 MR. MACLAY: Okay. Thank you.

13 THE COURT: Yes.

14 MR. MACLAY: Now with respect to Honeywell's
15 purpose I've already explained to you why in Judge Stark's
16 view the prior orders required purpose be examined. It's
17 also a matter of law, Your Honor, that many courts have
18 analyzed purpose even under Section 107. The Second Circuit
19 in Orion (indiscernible) Corp. said in limited circumstances
20 courts must deny access to judicial documents generally
21 where an open inspection may be used as a vehicle for
22 improper purposes. Similar statements were from the Rivera
23 case, also in our brief and the Fifty Stores case. But of
24 course this very case has similar holdings.

25 The district court in Kaiser, Your Honor, said,

1 "Although Section 107(a) evidences a strong desire by
2 congress to preserve the public's right to access judicial
3 records, that right is not absolute. Courts have
4 supervisory power over the records and files and may deny
5 access to those records and files to prevent them from being
6 used for an improper purpose."

7 In the same exact -- one sentence later after the
8 107 standard, Your Honor.

9 And then of course in this -- in all of these
10 cases Judge Stark ruled that one of Garlock's purpose was
11 appropriate and didn't analyze those other purposes except
12 implicitly by not permitting them to be pursued.

13 So any argument that purpose isn't something Your
14 Honor can consider is wrong, in fact frankly, Your Honor,
15 Your Honor must consider the purposes. And their purposes
16 here are inappropriate.

17 THE COURT: But what specific -- do you agree they
18 have to show specific harm under 107 -- Section 107?

19 MR. MACLAY: Under 107 -- well you have -- yes and
20 no, Your Honor. The short answer is kind of.

21 With respect to the common law test you have to
22 show particular harm and then your court engages in
23 essentially a balancing test.

24 THE COURT: Right.

25 MR. MACLAY: That's really also the case under

1 107, we do have to show undue risk of legal harms to
2 individuals. One second. But we have done that here. We
3 have -- and not only have we done that here, Your Honor,
4 that's implicit -- that's explicit in Judge Stark's
5 decision. His decision is premised in at least three
6 different points within it on making sure the privacy
7 interest of individuals were respected, in these same cases
8 for these same documents.

9 So I would suggest, Your Honor, that as a matter
10 of law of the case it's already established that these
11 documents do implicate privacy interests that must be
12 respected in the analysis.

13 THE COURT: Now Ford has said we don't want the
14 medical records, we want to know what form of asbestos
15 disease we're talking about, we want the names, we want the
16 four digits I guess of the social security number, and we
17 want to know what disease they claim to be suffering.

18 MR. MACLAY: And, Your Honor --

19 THE COURT: Is that a problem for you?

20 MR. MACLAY: It absolutely is because 2019
21 statements are not evidence of claims. And this goes back
22 into the garbage in garbage out argument, Your Honor, which
23 is given that 2019 statements, as Judge Fitzgerald
24 recognized, the court who entered those orders, who required
25 their submission, who was the most familiar with the

1 contents of the respective documents that were submitted,
2 they don't -- and even Judge Stark references this in his
3 decision, although he chooses not to get into it too much
4 and leave that to the other court -- but the bottom line,
5 Your Honor, is why except in an aggregate format that can't
6 be used against those individuals would you ever permit
7 these Fortune 500 companies to go after innocent asbestos
8 victims on a theory that they had alleged exposure in cases
9 in which they had filed 2019s?

10 Your Honor a bankruptcy court, Your Honor, you're
11 quite familiar with the limitations on the way 2019 used to
12 read, it doesn't even read this way anymore. And so the
13 argument that 2019 is an important rule and we have to
14 fulfill its purposes, well guess what, it's been revised so
15 none of these statements are required anymore, they're not
16 filed anymore. So clearly the public interest in it is
17 pretty light because, you know, the decision was made that
18 those requirements don't -- shouldn't exist.

19 But to allow the names, social security numbers,
20 and disease type to not just be produced to them but then to
21 be used by them to go after these individuals and impose
22 costs and burdens upon them, to allow Honeywell to try to
23 essentially suppress trust claims against the trust that is
24 financially responsible for in sort of an interim effect
25 those are illegitimate purposes, Your Honor, which shouldn't

1 be permitted, and it is problematic for that reason, and
2 that's why Judge Stark didn't permit it. That's why Judge
3 Stark only allowed the information to be used in the
4 aggregate.

5 THE COURT: Aggregate. That's right.

6 MR. MACLAY: Absolutely. And that's a critical
7 word, in the aggregate. His view of the privacy interests
8 was they would be violated by allowing them to use it in
9 individual situations, which is what these Fortune 500
10 companies are proposing to do. And of course it is clear
11 from Judge Stark's decision, Your Honor, that's what he was
12 doing.

13 As I mentioned there are three different places in
14 his opinion where he relies upon the privacy interests. For
15 example, he noted that privacy interests of the individuals
16 identified in the 2019 exhibits weigh against disclosure of
17 the exhibits to Garlock. The bankruptcy court was properly
18 concerned would they choose a privacy and possible identify
19 theft.

20 He noted that he provided Garlock access to the
21 2019 exhibits "subject to certain limitations that are
22 intended to substantially reduce any threat to privacy
23 interests."

24 He also noted that the limitations he's imposing
25 should largely, if not entirely, prevent identity theft and

1 other harms the bankruptcy court envisions might follow from
2 granting Garlock the access it seeks.

3 It is not a hypothesis, Your Honor, it is a proven
4 fact that the restrictions he imposed were intentional to
5 protect the privacy interests that he acknowledged were
6 important and that are part of both the common law right of
7 access restrictions and part of the Section 107 analysis.
8 And so I don't really think that should be open to
9 reasonable debate, Your Honor. And he certainly didn't run
10 those restrictions past Garlock itself before imposing them.

11 Now with respect to 107, obviously 107 has common
12 law analogs that have common law right of access, and so I
13 don't know how much time Your Honor wants to spend on kind
14 of discussing whether 107, you know, applies or not, so let
15 me just address it briefly and Your Honor can ask me any
16 questions that Your Honor would like.

17 THE COURT: Well, I think it does apply.

18 MR. MACLAY: Well, Your Honor, 107(a) applies to
19 papers filed in a case and on the dockets of a bankruptcy
20 court.

21 THE COURT: It doesn't say that on --

22 MR. MACLAY: It does say that, Your Honor. That's
23 the language of 107. Hold on one second.

24 THE COURT: Hold on a second. I have it right
25 here.

1 (Pause)

2 THE COURT: Paper filed in the case under this
3 title.

4 MR. MACLAY: And the dockets of a bankruptcy court.
5 And so, Your Honor, in the Keiser District Court decision
6 the Court said this: The 2019 orders made this information
7 "submitted pursuant to 2019 orders unavailable on the public
8 docket except upon motion by a party and order of the
9 bankruptcy court."

10 So there's an open issue, Your Honor, as to whether
11 107 applies to these documents at all because the exhibits
12 were not filed on the docket. I think that is a clearly
13 established fact. They were submitted to the Court, and if
14 you look at the very first page, the very first sentence of
15 Judge Starke (ph) decision, the very first sentence of his
16 decision he says, they were submitted to the Court -- to the
17 clerk.

18 And so --

19 THE COURT: Well, I --

20 MR. MACLAY: -- again --

21 THE COURT: -- I read that a little different.

22 MR. MACLAY: Uh-huh.

23 THE COURT: A paper filed in the case under this
24 title and the dockets of a bankruptcy case --

25 MR. MACLAY: Yes.

1 THE COURT: -- just two items --

2 MR. MACLAY: Joined by an injunction, an and. Now
3 I will tell Your Honor that Judge Starke asked me four years
4 ago in this -- in one of these courtrooms, I'm not sure if
5 it was this very courtroom, if I was aware of any precedent
6 analyzing whether that grammatical construction was correct
7 or incorrect. And I reported to him at that time I was
8 unaware of any decision reaching this one way or the other.

9 I still am with one exception. Judge Starke's own
10 decision clearly rests upon the common law. For example,
11 Section 5 of his decision is titled, "Garlock (ph) will be
12 granted access to the 2019 exhibits pursuant to the common
13 law right of public access to judicial records." He never
14 said in his opinion that 107 controlled or even applied,
15 although he cited to it as a see also in one footnote, and
16 maybe there are a couple of other references.

17 But the point being, Your Honor, there's at least a
18 significant legal question which frankly is murky about
19 whether 107 applies at all. That's presumably why Garlock
20 and now Honeywell heavily relied upon the common law in
21 their paper. If they really were so confident, Your Honor,
22 that 107 applies they wouldn't have even mentioned the
23 common law in their paper. They would have just argued 107.
24 But they argued both and, frankly, they led off with the
25 common law.

1 So it is not clear that 107 applies at all as a
2 legal matter. I think it's murky. And certainly Judge
3 Starke's decision which they purport to follow relied on the
4 common law. And so that's the precedent we have in these
5 very cases as law of the case.

6 No one has argued, Your Honor, that even under 107
7 that Your Honor is required to disregard privacy interests
8 or the risk of identity theft. In fact, as the statute
9 107(c) itself says, to the extent you find that there's a
10 "undue risk of identity theft or other unlawful injury" --
11 left broad -- to the individual or the individual's property
12 you can impose protections. That's what Judge Starke did.
13 And as we have argued to Your Honor, the fact that the
14 phrase "undue risk" is used and it's analogous to what was
15 done in the common law prior to 107 indicates that you
16 should engage in a balancing act or balancing test.

17 And if it is true as we have argued to you that
18 these 2019 exhibits are not evidence of exposure, are not
19 claims, but are merely filings by a lawyer to list basically
20 all of his clients that may have claims because if you don't
21 list someone in 2019 historically, Your Honor, you ran the
22 risk of having that claim be unable to vote --

23 THE COURT: Right.

24 MR. MACLAY: -- or have that claim even potentially
25 be expunged. It was -- there were sanctions that were --

1 that pertained to 2019 compliance. So as Judge Fitzgerald
2 recognized and as Judge Starke didn't rebut, didn't address
3 even because he went in a different direction in his
4 analysis, there's no basis to think that 2019 filing is
5 anything other than a lawyer's statement of who he
6 represents that might have a claim against the debtor.

7 And given that, to allow them to be used as
8 evidence of a claim is on its face illegitimate. And,
9 therefore, when balancing whether the privacy interest of
10 the individuals whose medical records, whose disease
11 diagnosis, whose names and social security numbers are in
12 the documents -- and by the way, Mr. Shineman (ph) had noted
13 in a report he issued that more than 400,000 redacted
14 (indiscernible) social security numbers. So there are a lot
15 of them in here. Whether they should have been or not is
16 besides the point. They're there and they're of course
17 required to be redacted. That wouldn't even be an option
18 open to the Court, I don't think, to not redact those.

19 THE COURT: Right.

20 MR. MACLAY: Clearly we argued the risk of identity
21 theft is undue. And one thing Mr. Shineman said that I
22 definitely agree with, Your Honor, which is that the process
23 in his hands was rushed and so documents were sort of
24 sampled to see if they could contain this information.

25 I can tell Your Honor that in my capacity as an

1 attorney in the Garlock case I have seen some of the 2019s
2 and I can confirm Judge -- Mr. Shineman's concern that
3 documents did get through that process that contained
4 information that was not supposed to be in them including
5 both social security numbers in full as well as
6 unfortunately medical records that possibly honestly back at
7 the time this was discussed four years ago no one really
8 knew they were in there because who knows what's in 1.3
9 million pages of information. It's a massive quantity.

10 But they are in there, Your Honor, and they
11 absolutely have to be protected, both because they're
12 personally identifying and because they're extremely
13 personal. The privacy interest inherent in those as the
14 Third Circuit has recognized in our -- as we point out in
15 our brief several times is extremely high. Any balancing
16 act -- test would certainly have to preclude that sort of
17 information for being produced frankly for almost any
18 reason.

19 So the information is clearly protectable under
20 both 107(c) and its common law analogue. It also included,
21 by the way, claim amounts. That was another piece of
22 information in the 2019s.

23 And for the reason I've already told you given that
24 Honeywell and Ford can't legitimately use them it makes --
25 you have to evaluate their purpose and wonder is there a

1 legitimate purpose for a document that doesn't actually show
2 exposure, that doesn't actually show that they have a claim.
3 If -- the purpose that these entities have admitted to is to
4 make the contrary argument.

5 Now in a bankruptcy context in the Western District
6 of Pennsylvania where the court -- where it's also overseen
7 by a bankruptcy court who is familiar with the bankruptcy
8 court processes, as was the case in Garlock, there is sort
9 of a check on that you could argue, Your Honor, because the
10 Western District of Pennsylvania Bankruptcy court can decide
11 to what extent they should be used.

12 But if you just release it into the public, if you
13 just allow them to use any state law tort case and any
14 lobbying effort there is no such restriction and you run a
15 much greater risk of misuse, Your Honor, which I think Your
16 Honor should be appropriately concerned with given Judge
17 Starke's ruling and the obvious types of this information
18 that we're talking about.

19 THE COURT: Well, their order provides anyone --

20 MR. MACLAY: I'm aware of that, Your Honor.

21 THE COURT: -- including, including Honeywell and
22 Ford.

23 MR. MACLAY: I'm aware, Your Honor, and that's
24 grotesquely inappropriate.

25 And they kind of -- the movants, Your Honor, have

1 tried to brush off the concept that the fact that some of
2 this information might be available somewhere else is not a
3 reason to prevent their protection here.

4 And I would just note for Your Honor, as is in our
5 briefs, the Supreme Court disagrees. The Supreme Court has
6 made quite clear statements that there's a vast difference
7 between the public records that might be found after a
8 diligent search of courthouse files, county archives and
9 local police stations throughout the country, and a
10 computerized summary located in a single clearinghouse of
11 information.

12 And on that basis it held that third party requests
13 for that information invaded privacy. That's the Supreme
14 Court of the United States.

15 It did it again in another context, when it held
16 "an individual's interest in controlling the dissemination
17 of information regarding personal matters does not dissolve
18 simply because that information may be available to the
19 public in some form.

20 So, Your Honor, as a legal matter the fact that
21 some of this information might be available in some other
22 context is frankly not relevant. And I found it very ironic
23 that the movant cited Judge Starke's comments about how some
24 of this would be what you would have to put in the complaint
25 anyway because first of all some of these people never filed

1 complaints, right. These are just clients of attorneys.

2 But secondly Judge Starke then imposed very
3 stringent privacy protections. So clearly what Judge Starke
4 thought is what he did. And what he thought was these
5 interests were worthy of protection. So you can't take an
6 out of context sentence from his decision and use it to
7 override the restrictions that he imposed. That would be
8 inappropriate and unwarranted.

9 With respect to the constitutional issues, I've
10 already noted, Your Honor, that if Your Honor was inclined
11 to really evaluate those we would need a separate set of
12 briefings. But let me just briefly say -- and there are a
13 variety of authorities that say you can't even do it in a
14 reply brief, much less in a -- I'm not even sure what to
15 call it. A supplemental brief on a different issue that was
16 unapproved.

17 But Local Rule 707(2)(b)(2) says that. The
18 Catholic Bishops case at 437 B.R. 488 at 492, note 19 says
19 that -- the cases (indiscernible) say that. You can't do it
20 and that's -- and if Your Honor was looking at that argument
21 we would need a new set of briefing to address it.

22 But just conceptually if they're talking about
23 prior restraints the case that they cite, I believe, the
24 Sorrell case, a Supreme Court case --

25 THE COURT: Yes.

1 MR. MACLAY: -- says prior restraints exist when
2 information a party possesses is subject to restraints on
3 the way the information is disseminated. They don't possess
4 this information yet. And there are numerous cases making
5 that distinction. Seattle Times, for example, a Supreme
6 Court case, 457 U.S. et 36 says that conditions on receipt
7 of document discovery are not prior restraints because there
8 were conditions on your getting the document.

9 The Sorrell Supreme Court case itself, 131 Supreme
10 Court at 2665 to 266 distinguished a law that put conditions
11 on access to government held information from prior
12 restraints. So the prior restraint argument is a complete
13 red herring, Your Honor, because they don't have it yet and
14 you're perfectly well positioned to place restrictions.

15 And if anything their argument establishes how
16 important it is that you do so because they're going to
17 argue if you give it to them without restrictions that they
18 get to use it in any way even someone later on says, this is
19 a horrible abuse. It will be too late then, Your Honor,
20 because of their prior restraint argument potentially.
21 That's why it is so important that these restrictions, if
22 you're going to allow any production whatsoever, that they
23 be placed now and immediately.

24 THE COURT: That they be placed now and --

25 MR. MACLAY: Meaning that before you allow any

1 production of any of this information to anyone you make
2 sure that it's subject to restrictions of the type that
3 Judge Starke imposed.

4 THE COURT: Okay.

5 MR. MACLAY: And just as a side point, counsel for
6 Ford noted that she had had discussions with me about the
7 2019s in the Garlock case. I'll note that in that case,
8 which is by the way 10-31607 at Docket Number 3378, Ford
9 acting through its same counsel here made the following
10 statement:

11 "Legitimate concerns about the disclosure of other
12 information shown to fall within the exception" --
13 107, but that wasn't in the quote -- "can and
14 should be addressed by redacting information where
15 necessary or placing limits on subsequent
16 disclosure."

17 This same party and this same lawyer made that
18 statement in the Garlock case and then cited Judge Starke's
19 decision as precedent for that and that's at page 11 of
20 their brief, which is Docket 3378, Your Honor.

21 So if we're going to get into what happened in the
22 Garlock case, that's the only relevant thing. Essentially,
23 an acknowledgment by the same lawyer for the same client
24 that their legal position now is invalid.

25 Now one thing that is sort of implicit in what we

1 heard today from Mr. Shineman, Your Honor, is when Your
2 Honor does the balancing that's required expressly under the
3 common law or implicitly by the undue word in the 107 test,
4 it's the burden not just on the parties I would argue, Your
5 Honor, but on the Court. You've heard now that the very
6 time consuming and expensive and intensive process that Mr.
7 Shineman engaged in, the output of that is not in Your
8 Honor's possession anymore. It is in another court
9 apparently, the Western District of Pennsylvania. I don't
10 know if that's frankly true or not, Your Honor, but at least
11 that's been asserted.

12 I know for -- to my information, Your Honor, it is
13 not in the possession of the clerk in the Western District
14 of North Carolina, which was argument made, because it was
15 never submitted into evidence, how could it be. But even if
16 it were you wouldn't be the right court to go to about it.
17 But I don't think that it is. It's not to my knowledge in
18 the possession of that clerk, Your Honor.

19 And so let's just talk, Your Honor, a little bit
20 about what Judge Fitzgerald did on remand because after
21 Judge Stark issued his decision there were some details that
22 had to be worked out.

23 THE COURT: Yes.

24 MR. MACLAY: That's why Mr. Shineman was engaged.
25 Judge Fitzgerald worked through those details. She --

1 THE COURT: She produced --

2 MR. MACLAY: She entered --

3 THE COURT: -- a protocol.

4 MR. MACLAY: Exactly. A protocol order, Your
5 Honor, a ten-page single-spaced document which laid out with
6 an admiral degree of specificity how the process was going
7 to be carried out.

8 And it noted that there was going to be a special
9 master planned. It noted that they were over 3,300 CDs,
10 many of which contained excluded documents and personal
11 identifiers. It noted that the clerk's office had confirmed
12 that there were many social security numbers in their
13 fullness in these documents.

14 THE COURT: Yes.

15 MR. MACLAY: It noted that all costs, fees and
16 expenses associated with the exhibit production shall be
17 itemized by the vendors and paid for in fully by Garlock.

18 THE COURT: Right.

19 MR. MACLAY: As well as the cost incurred by the
20 courts. It had all sorts of special details with respect to
21 the inspection of the files, how there would be files called
22 vendor to special master, produced to Garlock or excluded
23 from Garlock. That's paragraph 33 of the protocol order.

24 Paragraph 43 of the protocol order noted that
25 affidavits were required of certain individuals receiving

1 information confirming that they understood the restrictions
2 imposed by the various orders. It ended up being 300, the
3 ones by Judge Starke. The subsequent protective order
4 issued in the Western District of North Carolina and the
5 protocol order entered by Judge Fitzgerald on remand. And
6 that included a return and destruction requirement as Your
7 Honor noted earlier in today's comments.

8 So it's a lot of work to go through for something
9 that they can't use in any legitimate fashion and we would
10 argue, Your Honor, that they've acknowledged their intent to
11 use it in an illegitimate fashion. And Your Honor both
12 should and must consider that in discussing whether they get
13 it whatsoever.

14 And so with that, Your Honor, the Narco TAC rests.

15 THE COURT: All right. Thank you. Thank you.

16 Mr. Harron.

17 MR. HARRON: Hello again, Your Honor. Ed Harron
18 for Larry Fitzpatrick who is the future claimant's rep in
19 Narco.

20 THE COURT: Yes.

21 MR. HARRON: And, also, Jim McMonigal (ph) filed a
22 joinder as a future claims rep in (indiscernible). And both
23 Mr. McMonigal and Mr. Fitzpatrick, they served during the
24 bankruptcy cases, but they continue to have an oversight
25 role with those trusts respectively.

1 Your Honor, I don't want to repeat what Mr. Maclay
2 has said. I think he articulated his legal position very
3 well. My clients would adopt his position and the rationale
4 that he's offered for it.

5 But, Your Honor, I think you're at a disadvantage.
6 The people on this side of the courtroom, we've been
7 fighting this fight for 15 years --

8 THE COURT: Yes.

9 MR. HARRON: -- and we dropped it in your lap for a
10 couple of weeks. And we've got staffs and people and you're
11 a little outgunned on this side. So I thought some -- not
12 intellectually, just so I -- in terms of --

13 THE COURT: I understand --

14 (Laughter)

15 THE COURT: -- Mr. Harron and I appreciate --

16 MR. HARRON: -- the number of hands.

17 THE COURT: -- and I appreciate your insight.

18 MR. HARRON: The number of hands on this. And so -
19 - and, Your Honor, I know this is going to come up later,
20 but that's one of the reasons we suggested that Judge
21 Fitzgerald might be helpful.

22 MR. MACLAY: Yes.

23 MR. HARRON: She lived it across all of these
24 cases.

25 But, you know, Mr. Azman made a suggestion at the

1 beginning of his remarks that attack and we are in this in
2 some effort to run up costs and are victimizing Honeywell's
3 role as a, you know, a good faith participant in the Narco
4 Trust.

5 Well, there's another side to that story as you may
6 think. As you may know Honeywell has agreed to pay the
7 Narco Trust on an evergreen basis up to \$150 million per
8 year --

9 THE COURT: Right.

10 MR. HARRON: -- to fund claims as they're approved.
11 So why did Honeywell agree to this level of funding. Well,
12 it's because Honeywell was Narco. It's set forth in the
13 record. It's not disputed. Narco was an unincorporated
14 division of Honeywell while Narco was selling the products
15 that contained asbestos.

16 THE COURT: Okay.

17 MR. HARRON: And then Narco was spun off and became
18 its own corporation. For years there were disputes between
19 Narco as the new company and Honeywell over which bag of
20 asbestos was sold by Honeywell's Narco, which bag of
21 asbestos was sold by the new Narco. They couldn't ever
22 figure it out and claimants, because the bags were named in
23 the same manner couldn't decide who to sue. So they sue
24 everybody.

25 So Honeywell is responsible for Narco's asbestos

1 that was in the market for decades and killed a lot of the
2 husbands of the widows who are claimants, so-called
3 claimants or at least on the exhibits to the 2019.

4 And Your Honor may note these exposures occurred in
5 the 50s, 60s, 70s. By the 80s the use of asbestos was
6 diminishing and these exposures occurred on industrial
7 sites. So you're dealing with failing memories and in many
8 cases of a widow where it was her husband who was exposed at
9 the industrial site.

10 And the way the Narco product was used, it was a
11 refractory cement. It went into industrial furnaces to make
12 the bricks and whatever else is in an industrial furnace
13 more resistant to heat.

14 THE COURT: Okay.

15 MR. HARRON: It was a bag of mix. It was poured,
16 stirred. Dust went everywhere. So everyone at the furnace,
17 around the furnace was exposed. Workers went home. The
18 wife would wash the clothes. The people in the household
19 would be exposed.

20 And why is this significant here? One, Honeywell
21 is not agreeing to fund Narco out of the goodness of its
22 heart. It was liable for poisoning people for years. And,
23 Your Honor, I'll limit myself to reference the poison to the
24 extent that they'll limit their references to fraud.

25 Your Honor, let's talk about fraud for a second.

1 As I mentioned these are elderly claimants that were exposed
2 decades ago to products that may or not -- may or may not
3 have been packaged during the time of the exposure. They
4 may have been used. And sometimes a product would have the
5 same name and one year that product would contain asbestos,
6 the one year -- the next year it wouldn't contain asbestos.

7 So the naming game is difficult on both sides of
8 the fence. What defendants often refer to as fraud, and
9 that's what they were screaming about in Garlock and --

10 THE COURT: Yes.

11 MR. HARRON: -- that's what you see in the press.

12 THE COURT: Yes.

13 MR. HARRON: We refer to as difficulty in
14 determining which defendant was responsible for the product.
15 The individuals at issue here, there's no doubt that they're
16 sick. There's no doubt that their sickness was caused by
17 asbestos. Mesothelioma, which is where the bulk of the
18 money goes, the only known cause of mesothelioma is exposure
19 to asbestos.

20 THE COURT: Right.

21 MR. HARRON: So these people know they're sick.
22 They're either dead or dying. But they don't know which of
23 the many defendants is responsible for poisoning them in the
24 first place. So plaintiffs firms and other lawyers through
25 due diligence over time identify who may or may not have

1 poisoned them.

2 So to the extent that a claimant may or may not be
3 able to name a certain defendant in one proceeding and then
4 through diligence, discovery may be able to name a defendant
5 in the next proceeding, not necessarily an indicia of fraud.

6 And what you may have is you may have in a
7 deposition someone may say, were you exposed to Narco
8 castalyte (sic) whatever and then they say, never heard of
9 that. In the next deposition they say, did you ever see
10 this bag, and the Narco bag had an Indian head on it. And
11 they'll say, oh, I do remember that now. It was a long time
12 ago, but I remember that bag. So that's what happens often
13 in asbestos litigation, largely because of the names --
14 pardon me -- the nature of the asbestos exposure, the
15 passage of time, and the conduct of defendants who go to
16 great lengths to hide which of their products were at which
17 sites.

18 So, Your Honor, when we talk about the individuals
19 at issue here I just thought it was important that you
20 recognize that this fight's been going on for a long time
21 and there are two sides to the coin. The people who were
22 least involved in the fight are the people who are named on
23 the exhibits to the 2019 filings. All they did was go to a
24 lawyer and say, I'm dying of asbestos or my spouse is dead
25 from asbestos. Their lawyer was required, because the

1 defendants filed bankruptcy, to submit a 2019 statement.

2 THE COURT: Right.

3 MR. HARRON: And most of those people have no idea
4 that this proceeding is occurring today.

5 Your Honor, another thing that's relevant about the
6 nature of the exposure to the product and the history is
7 even when Honeywell and Ford get this information they're
8 not going to be able to do anything with it because as Judge
9 Fitzgerald recognized once she sets forth her protocol the
10 fact that someone is named on a 2019 means very little in
11 respect of whether or not they're alleging exposure to these
12 defendants.

13 Quite frankly, Your Honor, I think this is an
14 effort to harass the claimants. And, Your Honor, why would
15 I say that? Well, I know that in Narco Honeywell is doing
16 everything it can to not pay the trust. Since it's been up
17 and running and processing claims for the last three or four
18 years I would say that Narco's gone out of pocket to pay
19 newly filed claims zero.

20 And, Your Honor, Mr. Azman mentioned that they took
21 us to court in the Western District of Pennsylvania.

22 THE COURT: Right.

23 MR. HARRON: They lost. I just think that's
24 another important fact. They raised allegations against the
25 trust. They sought an injunction. Judge Agresti (ph) there

1 denied it.

2 So with that context in mind, Your Honor, you're
3 familiar with Judge Starke's ruling. You've read 107 and
4 107(c). I think under the common law, under the precedent,
5 under the Bankruptcy Code it's a balancing test.

6 And we assert as Mr. Maclay articulated very well
7 that they have shown no legitimate basis to obtain this
8 information. I submit largely it's an opportunity to harass
9 innocent victims of asbestos. We think there are many good
10 reasons that this information should be protected.

11 I believe recently and I don't have my notepad. So
12 in -- I think it was in the Decs (ph) case where Your Honor
13 recognized that employee information was sensitive and
14 shouldn't --

15 THE COURT: Yes.

16 MR. HARRON: -- be disclosed on the public docket.

17 THE COURT: Yes.

18 MR. HARRON: This is analogous to what we have
19 here. And there was another case. What's the -- in Wet
20 Seal, Your Honor, there was -- in that case there's actual
21 evidence of identity fraud where a bad actor obtained
22 information from the docket and filed false claims. And I
23 think you can take notice of that, that those are the types
24 of dangers that the Court needs to be sensitive to when it
25 resolves this dispute.

1 But, Your Honor, unless you have specific questions
2 that's all I wanted to say.

3 THE COURT: Well, I know it's a balancing test.
4 But don't I have to have some specific facts from the side
5 of the Narco TAC and future claimants of harm? Do I have
6 any specific facts of harm?

7 MR. HARRON: Well, Your Honor, I think you could
8 take judicial notice of the harms that occurred in the Wet
9 Seal case. I think it's a matter of public record, the
10 dangers of releasing private information into the public
11 domain. Mr. Maclay said the harm is evident if we were
12 going to take this information and spread it all over the
13 public record.

14 And, Your Honor, the other difficulty is that, you
15 know, we can't identify specific harms in the abstract
16 because we're trying to prevent those harms in the first
17 place. The information --

18 THE COURT: Right.

19 MR. HARRON: -- is not out there. I think Judge
20 Starke and Judge Fitzgerald took notice of the potential for
21 harm when they imposed the limitations that they did.

22 THE COURT: Okay. All right. Thank you, Mr.
23 Harron.

24 MR. HARRON: Thank you, Your Honor.

25 THE COURT: Thank you.

1 Does anyone need a break? I'm fine, but do people
2 need a break at this point?

3 UNIDENTIFIED SPEAKER: From our side we would like
4 to continue if that's okay with Your Honor.

5 THE COURT: That's fine with me.

6 All right. Good morning. Oh, it's a -- well, I
7 guess it's still morning. Yes.

8 MS. RAMSEY: Thank you, Judge Gross. I'll be very
9 brief, but I wanted to augment a little bit.

10 THE COURT: Remind me who you're representing.

11 MS. RAMSEY: Certainly, Your Honor. I'm
12 representing Waters Kraus & Paul. It's an asbestos
13 plaintiffs' law firm.

14 THE COURT: Yes.

15 MS. RAMSEY: And we filed a joinder to the response
16 filed by the Narco TAC. And we would join in the argument
17 that Mr. MacLay made today as well as Mr. Harron's argument.

18 I wanted, though, to augment a little bit Mr.
19 Harron's response to the Court's question about harm --

20 THE COURT: Yes.

21 MS. RAMSEY: -- because I think the harm here is
22 palpable. When Ms. Sieg was making an argument earlier she
23 referred to the persons who were identified on the exhibits
24 to the 2019 statements as creditors. That's a term of art
25 obviously in a bankruptcy case. It is the term that's used

1 in Rule 2019.

2 But when Judge Fitzgerald modified the order it was
3 to address the unique circumstances in an asbestos
4 bankruptcy where you don't just have asbestos current
5 creditors, but you have potential future creditors who have
6 already been harmed, but are in various stages of discovery,
7 haven't yet maybe brought their case or haven't completed
8 their full due diligence. As Mr. Harron said, the
9 investigative process in an asbestos case can take some
10 time. It's fact intensive.

11 And you have individuals that are diagnosed with an
12 asbestos illness and who either are -- have a memory -- have
13 memory issues or you have the family who may not have the
14 full exposure history. And if there is a basis to believe
15 that a defendant might be responsible it is the attorney's
16 responsibility to try to preserve the ability to recover
17 until such time as the due diligence is completed. And with
18 the filing of a bankruptcy case and the automatic stay that
19 goes into effect with that discovery comes to a halt. So to
20 the extent that it is incomplete it remains in that stage of
21 incomplete -- incompleteness.

22 Judge Fitzgerald knew that, recognized it. It was
23 well understood in connection with the 2019 process that she
24 put into place. And in the Pittsburgh Corning case in
25 opinion on the 2019s she herself said:

1 "And that was made clear when the law firms agreed
2 to file the 2019 statements. In some instances they
3 represent potentially future claimants, people who know
4 they've been exposed but have no injury, demand holders, and
5 yet those people may never have a demand because their
6 injury may never manifest. And so the statements don't
7 necessarily show there is a 'present creditor involved.'
8 That's the difficulty with a 2019 in a mass tort context."

9 Those -- that was the understanding that Judge
10 Fitzgerald had. That was the understanding that the bar
11 had. And yet it's clear that what the intention of
12 Honeywell and Ford is is to take a person who appears on
13 that 2019 --

14 THE COURT: Right.

15 MS. RAMSEY: -- and to accuse that person of fraud
16 if they are now involved in litigation where they have not
17 said that they have a claim against the particular asbestos
18 defendant where that 2019 was filed. So you have an already
19 injured plaintiff who -- or the family of a deceased
20 plaintiff who is already in extremeness, has suffered a very
21 significant injury and now they're in a position of having
22 to defend themselves from an allegation that they've
23 committed fraud.

24 There's reputational harm. There is a cost to
25 that. There is a very real and very concrete other harm, to

1 use the terminology of 107(c) or improper purpose, to use
2 the common law phrasing, that is present here that
3 distinguishes this case considerably from Judge Starke's
4 agreement to permit 2019 exhibits to be produced to Garlock
5 for the limited purpose of its use before a Bankruptcy Court
6 who understood fully what a 2019 was and was not, was
7 presiding over an asbestos bankruptcy and understood the
8 parameters and the unique aspects of an asbestos bankruptcy
9 in an estimation trial where everyone involved in that trial
10 could argue their respective positions with respect to that.

11 This is a very, very different situation and, Your
12 Honor, we would urge the Court to deny access based upon the
13 intended obvious harm here.

14 Thank you.

15 THE COURT: Thank you.

16 MS. RAMSEY: Do you have any questions for me, Your
17 Honor?

18 THE COURT: No, I don't. No, I don't.

19 MS. RAMSEY: Thank you.

20 THE COURT: I certainly understand your position.

21 Anyone else?

22 Mr. O'Neal.

23 MR. O'NEAL: Yes, Your Honor.

24 MR. MACLAY: Your Honor, can I just make one
25 request?

1 THE COURT: Yes.

2 MR. MACLAY: Your Honor has asked a couple of
3 questions that I would like the opportunity to address at
4 the end of this if I may. I just wanted to put that out
5 there.

6 THE COURT: I'll give you that opportunity, Mr.
7 Maclay. Absolutely.

8 MR. MACLAY: Thank you, Your Honor.

9 THE COURT: Yes.
10 Mr. O'Neal.

11 MR. O'NEAL: Yes. Thank you again, Your Honor.
12 James O'Neal on behalf of the reorganized debtors and W.R.
13 Grace.

14 THE COURT: Yes.

15 MR. O'NEAL: Just a point on the cost, we filed a
16 limited response opposing any costs being imposed on the
17 reorganized debtors and in Honeywell's response they agreed
18 that they would be submitting a revised order which does not
19 seek to impose any costs on the debtors and the reorganized
20 debtors would not be bearing any costs in connection with
21 production of the 2019 exhibits to Honeywell or any other
22 party.

23 So I just wanted to clarify that we do have a
24 statement from Honeywell with respect to costs. At least as
25 far as the reorganized debtors go, they don't seek to impose

1 any costs on the reorganized debtors.

2 THE COURT: That's right.

3 MR. O'NEAL: Okay. Thank you very --

4 THE COURT: Thank --

5 MR. O'NEAL: -- much, Your Honor.

6 THE COURT: Thank you.

7 Mr. Madron.

8 MR. MADRON: Thank you, Your Honor. Again for the
9 record Jason Madron on behalf of Armstrong World Industries
10 and Kaiser Aluminum.

11 Your Honor, on the phone for Kaiser Aluminum is my
12 co-counsel, Amanda Suzuki, of Jones Day. I'll let her speak
13 on behalf of the Kaiser debtors. But just to briefly touch
14 on the Armstrong debtors, Your Honor, we did file as I'm
15 sure Your Honor saw a very brief response, almost a
16 reservation of rights.

17 THE COURT: Yes.

18 MR. MADRON: Most specifically, the Armstrong
19 debtors objected to the extent that the cases would be re --
20 or the Armstrong case would be reopened. Obviously, that
21 could subject Armstrong to the U.S. Trustee fee and
22 reporting obligations and the like. And Armstrong feels
23 that that would be inappropriate. We obviously cite to the
24 Garlock decision where Judge Starke found that the cases
25 need not be reopened --

1 THE COURT: That's right.

2 MR. MADRON: -- to adjudicate an issue very similar
3 if not on all fours to this.

4 So for a number of reasons, one, I don't believe
5 anybody has requested that Your Honor reopen the case.
6 Indeed, in Footnote 2 of Honeywell's motion they
7 specifically state that it's not necessary for Your Honor to
8 reopen the case. So we would obviously respectfully request
9 based on the Garlock precedent as well as the fact that
10 there is no motion pending before the Court to reopen
11 Armstrong's case that the case remain closed.

12 I would, however, join that Armstrong should not be
13 subject to any fees or cost or expense. We take no position
14 whether or not any relief should be granted to any of the
15 movants here today, Your Honor.

16 But to the extent that Your Honor does grant relief
17 to the movants Armstrong should not bear the cost or expense
18 of that. I believe Owens Corning pointed out in their
19 response that in the Garlock case the order or the protocol
20 that was ultimately entered by Judge Fitzgerald on remand
21 specifically found that Garlock would exclusively, at
22 paragraph 26 of that protocol, be responsible for any
23 expense. We believe the same result should be true here to
24 the extent that Your Honor is entitled -- is inclined to
25 grant access.

1 THE COURT: All rgiht.

2 MR. MADRON: Thank you, Your Honor.

3 THE COURT: Thank you, Mr. Madron.

4 MR. ISENBERG: Good afternoon --

5 MS. SUZUKI: Your Honor, this is Amanda Suzuki from
6 Jones Day for Kaiser.

7 THE COURT: Yes. Good afternoon.

8 MS. SUZUKI: Good afternoon. I would like to
9 primarily just echo what Mr. Madron said with respect to
10 Kaiser. Similarly, I -- we filed a reservation of rights
11 and indicated first that Kaiser should not be responsible
12 for any costs related to reopening the bankruptcy cases.
13 And as Mr. Madron said we don't think any motion is on file
14 or that it is even necessarily necessary to reopen the
15 cases. But we would just like to kind of reiterate that
16 point.

17 And second to, you know, just briefly echo what Mr.
18 Madron said, we also do not believe that the Kaiser
19 reorganized debtors should be responsible for any costs
20 related to any of the relief requested here today to the
21 extent the Court is inclined to grant it.

22 Thank you, Your Honor.

23 THE COURT: Thank you. Thank you.

24 Yes.

25 MR. ISENBERG: I was going to say good morning,

1 Your Honor, but I will say good --

2 THE COURT: It's --

3 MR. ISENBERG: -- afternoon, Your Honor.

4 THE COURT: It's afternoon already, Your Honor.

5 MR. ISENBERG: Adam Isenberg, Saul Ewing, on behalf
6 of the reorganized Owens Corning debtors.

7 THE COURT: Yes, sir.

8 MR. ISENBERG: Your Honor, we filed a very brief
9 response. We take no position as to whether Honeywell,
10 Ford, or any other party should or should not be granted
11 access to the 2019 exhibits.

12 I will just note a couple of things for the record,
13 Your Honor. Our case was confirmed in October of 2016.

14 THE COURT: Okay.

15 MR. ISENBERG: The cases have been closed for at
16 least six years. Whether there is fraud or impropriety or
17 not in the asbestos bar it is not our issue. It is not our
18 fight. And we take no position on that.

19 But we filed a response, Your Honor, because of the
20 proposed mechanics and the proposed form of order that
21 Honeywell had submitted with its motion. I think we have
22 agreement there's a statement in the response filed by
23 Honeywell or the reply filed by Honeywell that Owens would
24 not be bearing the cost for this. I hope that's still the
25 case, Your Honor.

1 If that is the case, we would want to see any
2 proposed form of order that Honeywell would submit. But
3 subject to that, Your Honor, I think our issues are
4 resolved.

5 THE COURT: All right. Thank you.

6 MR. ISENBERG: Thank you.

7 THE COURT: Thank you, Mr. Isenberg.

8 Why don't we do this? Let's take a ten-minute
9 break or 15 minute break because I think we've been going at
10 it a while and it's now time for replies, and this would
11 probably be an appropriate time to do that.

12 So we'll be back here at 25 after.

13 Thank you, everyone.

14 MR. MACLAY: Thank you, Your Honor.

15 (Recess taken at 12:07 p.m.; resumed at 12:25 p.m.)

16 THE CLERK: Please rise.

17 THE COURT: Thank you, everyone. You may be
18 seated.

19 MR. AZMAN: Your Honor, I think Mr. Maclay wanted
20 to make some follow up remarks and if he feels he needs to
21 do it I would like for that to happen now and then we can
22 close with our reply. Does that work for Your Honor?

23 THE COURT: Mr. Maclay.

24 MR. MACLAY: With the understanding that I may then
25 have rebuttal remarks after that depending --

1 THE COURT: All right.

2 MR. MACLAY: -- if (indiscernible) I'm willing to
3 do that.

4 (Laughter)

5 MR. MACLAY: It would be more efficient to wait,
6 but it's up to Your Honor.

7 THE COURT: Let's proceed with Honeywell.

8 MR. AZMAN: No problem. Again, for the record
9 Darren Azman, McDermott, Will & Emery for Honeywell.

10 Your Honor, I think Mr. Maclay is being quite
11 disingenuous. Mr. Maclay was counsel to the asbestos
12 claimants' committee in Garlock. And he's here representing
13 the Narco TAC. By their pleadings and response to our
14 motion to strike they explained to Your Honor that they're
15 essentially acting on behalf of Narco TAC claimants.

16 In Mr. Maclay's role as counsel to the asbestos
17 claimants' committee in Garlock it was no different. Mr.
18 Maclay negotiated the very order that gives us the right to
19 use the Garlock 2019 exhibits for whatever purpose we want,
20 the same order that we've submitted to Your Honor.

21 So if that doesn't raise some eyebrows I'm not sure
22 what does when Mr. Maclay is the one who negotiated that
23 very order. I mean, he relies a lot on saying the consent
24 orders have no precedential effect. Well, when you're the
25 one that negotiated it, it kind of does.

1 In response to --

2 THE COURT: Well, I don't know all the differences
3 between the Garlock case and these cases.

4 MR. AZMAN: Well, I was only referring to who was
5 acting --

6 THE COURT: I don't know, for example, if there
7 were decisions from the Third Circuit Court of Appeals that
8 say if you want access file a motion. And then your order
9 provides that anyone may have access. I don't understand
10 that at all.

11 MR. AZMAN: Well --

12 THE COURT: You're not here on behalf of anyone.
13 You're here on behalf of Honeywell and you're here on behalf
14 of Ford. And I don't know why you're opening this up to
15 everyone in the world to come in and say, we have access
16 now.

17 MR. AZMAN: Well, Your Honor, I -- and I'll get to
18 this in a minute, but I think we have to bring this back
19 home to what really matters and what is important here and
20 that is Section 107. And I'll -- again, I'm going to go
21 through all those elements in just a moment. But if Your
22 Honor does not find that any of the 107 exceptions is
23 applicable, I don't see how you can order it to not be made
24 available to anybody who's interested. And I'll cite a
25 couple of cases from this --

1 THE COURT: I don't know that --

2 MR. AZMAN: -- district --

3 THE COURT: -- I can or can't.

4 MR. AZMAN: Well, let me --

5 THE COURT: But I know that your motion didn't
6 speak for everyone. It spoke for Honeywell --

7 MR. AZMAN: Understood.

8 THE COURT: -- and then the order speaks for
9 everyone.

10 MR. AZMAN: Let me cite just a few cases --

11 THE COURT: All right.

12 MR. AZMAN: -- from this Circuit. This is
13 Continental Airlines, a '93 case. The Court finds that
14 issues regarding public disclosure of papers filed in
15 connection with bankruptcy proceedings generally should be
16 resolved under Section 107 since Congress has pulmogated an
17 express statutory scheme addressing public access to papers
18 filed in bankruptcy cases. That's just what Continental
19 says. That just says that 107 trumps the common law. And
20 again I'll come back to that.

21 Because -- and this is now a case citing
22 Continental from the Northern District of Ohio -- because
23 congress enacted an express statutory scheme issues
24 concerning public disclosure of documents in a bankruptcy
25 case should be resolved under 107. It says the same thing.

1 Now here's the important quote from a bankruptcy
2 court in the District of Vermont: "If the 107 exceptions do
3 not apply the inquiry is complete and the Court's decision
4 will favor public access." Your Honor has to make a
5 determination at some point as to whether any of these
6 exceptions under 107 applies. If it does not apply it needs
7 to be made public. That's the bottom line. It doesn't
8 matter that other parties are not here before Your Honor.

9 And I'm not sure Your Honor really wants to do
10 that. Does Your Honor really want 100 parties every single
11 time they need to get access to the same document that
12 you've already granted access to come into the court --

13 THE COURT: That's what the Third Circuit told me
14 to do.

15 MR. AZMAN: Well, I'm not sure --

16 THE COURT: Didn't it?

17 MR. AZMAN: In which case, Your Honor?

18 THE COURT: Well, I don't have the cite in front of
19 me. But isn't that what the Third Circuit said when it
20 affirmed Judge Fitzgerald?

21 MR. AZMAN: Your Honor, the Third Circuit opinion
22 was not -- it affirmed the process for --

23 THE COURT: Yes.

24 MR. AZMAN: -- for filing results of the electronic
25 docket. There was no finding about whether it was

1 appropriate for them to be sealed or whether any of the 107
2 exceptions applied. There's never been a finding about 107
3 had complied except in Judge Starke's opinion. That's the
4 only opinion that's ever been issued about whether an
5 exception applies.

6 So I don't agree with that characterization of what
7 the Third Circuit was really addressing in that case.

8 THE COURT: All right.

9 MR. AZMAN: Now, Your Honor, let's go back to what
10 Judge --

11 THE COURT: Why do you care if everyone has access?

12 MR. AZMAN: Well --

13 THE COURT: Why does Honeywell care?

14 MR. AZMAN: -- this is a mass tort issue, Your
15 Honor, and as numerous courts have stated it fosters truth.
16 Okay. That's our goal is to foster truth and --

17 THE COURT: Your goal is not to foster truth. Your
18 goal is to represent your client.

19 MR. AZMAN: You're absolutely right. But the
20 ability of other parties to see this information and then
21 perhaps reach out to our client and coordinate them, that is
22 representing my client. To the extent that 50 other people
23 may have information and see something different that we
24 haven't seen, that is exactly why we think it is important
25 for anybody to be able to get access to these documents.

1 For example, Ford. We've collaborated with them on
2 a number of occasions, not just in this case, but in other
3 cases involved in asbestos and other matters.

4 THE COURT: Yes.

5 MR. AZMAN: That is important to us, Your Honor.
6 It's just as important for us to have access as it is for
7 others to be able to see it and think about it maybe in a
8 different light.

9 THE COURT: All right.

10 MR. AZMAN: Now in terms of describing all of the
11 reasons that Honeywell might want to use these 2019 exhibits
12 we don't have to do that. There is an attorney/client
13 privilege I don't need to tax counsel what we intend to do
14 with this. And that's not what the motion is about. That's
15 not what's on trial here. We're not talking about the
16 merits of what the 2019 statements say or don't say. And
17 that's exactly what Judge Starke said in his opinion. It
18 makes no difference. That's not to be decided today and it
19 has nothing to do with the right of access under either
20 common law or Section 107.

21 Now let's turn to the ballots. Mr. Maclay said,
22 well, if the ballots have all the information you want then
23 why are we here today. Well, he's absolutely right except
24 on one thing. They don't have all the information we want.
25 The ballots have creditors who filed claims and elected to

1 vote on them. Okay.

2 But it's the same type of information. All of
3 those ballots were unsealed in the Garlock case. So if Mr.
4 Maclay is arguing that there is a difference between
5 individual, number one Jane Doe who was already -- whose
6 information is already public as a result of unsealing the
7 ballots and John Doe whose information is not, it's the same
8 exact information, it's just a different person. The
9 character of the information doesn't change just because you
10 throw it in a 2019 exhibit. There's no difference.

11 Now I want to turn to Mr. Maclay's statement that
12 our reliance on the common law is some sort of indication as
13 to our view as to the applicability of Section 107. That's
14 just not true. Let's first start with whether these are
15 papers filed in a case. I think Your Honor sees past that
16 nonsensical argument.

17 As Judge Starke did in a footnote he clearly
18 recognized that he was addressing 107 throughout various
19 portions of his brief. And if you look at case law on 107
20 people have tried to argue that discovery materials are not
21 papers filed in a case because they aren't actually filed.
22 Every court has rejected that kind of argument. These are
23 case -- these are papers filed in a case. But I won't spend
24 too much time on it because, again, I think it's pretty
25 clear.

1 The second point under 107 is that it trumps common
2 law. I just went through all of those cases. You need to
3 look at 107 and find that one of these exceptions applies.
4 There is no weighing of the interest. Either an exception
5 applies or it does not, and if it does not, then it needs to
6 be made available to the public.

7 And, Your Honor, again, I'm going to turn in just a
8 moment and go through each of the 107 exceptions, but as a
9 general matter as I stated in my opening the argument that
10 any exception under 107 applies to the information in these
11 2019 exhibits, it doesn't make any sense. For example,
12 identity theft. How is it possible that I -- that asbestos
13 claimants who have been including this very same type of
14 information in state and federal court complaints for years
15 in asbestos cases haven't had the issue of identity theft.
16 Why is it all of a sudden an issue now because it might be
17 revealed under a 2019 exhibit. It is the exact same
18 information.

19 And the same can be said for any of the other
20 exceptions under 107, other unlawful injury to an individual
21 or their property. That hasn't happened.

22 Now let's go through 107 because I think that's
23 really important. Like I said I want to bring things back
24 home to what Your Honor has to decide on the law and the
25 facts.

1 107(c). let's start with that. Undue risk of
2 identity theft. Here's the test. Disclosure of personal
3 information by itself is not necessarily causally related to
4 identity theft. As Ms. Sieg said, you need to show an
5 identity thief and a vulnerable account. "A speculative
6 possibility theft" -- and I'm quoting here -- "is not enough
7 to trump the importance -- the important governmental
8 interest behind Section 107."

9 "Now the tax argument on 107(c)" -- and I'm quoting
10 here from their brief -- "public release of personally
11 identifying information and medical information and records
12 certainly carries with it the threat of identity theft or
13 other unlawful injury."

14 Your Honor, that's the extent of facts if you could
15 call that that would support a 107(c) finding here. There's
16 no mention of who might try to steal the identities or what
17 they might do with it or how they would go about doing that.
18 And there's certainly no demonstration of any undue risk of
19 that happening. And this just doesn't cut it under 107(c).

20 There is nothing in this court that's been
21 submitted to this Court that you could rely upon to find
22 that 107(c) applies. And it's interesting to note that
23 counsel really hasn't much talked about any of the 107
24 exceptions other than in just broad strokes. They haven't
25 gone through and told Your Honor what specifically. You

1 know what they've told Your Honor, judicial notice of harm.
2 I don't know what that means. I've never heard of that
3 before.

4 I think the harm is palpable. Again, that's not
5 evidence. Your Honor has no evidence in front of him.
6 There are no declarations. There's just nothing other than
7 there's a name in it. Somebody might steal their identity.
8 That's all you have.

9 Now let's turn to undue risk of other unlawful
10 injury. Again, Your Honor, the test is specificity and
11 articulated reasoning are essential. I don't think that
12 judicial -- Your Honor should take judicial notice of harm
13 supports the articulated reasoning that is required to show
14 that there's going to be undue risk of other unlawful
15 injury.

16 They mentioned -- the TAC mentions in their brief
17 tortuous invasion of privacy and tortuous harassment as if
18 they just picked those terms out of a book and said, let's
19 throw that in there. Not a single case cite, not a single
20 fact that talks about tortuous invasion of privacy. So I --
21 I just don't see how there's anything that Your Honor could
22 rely upon to find that there's undue risk of other unlawful
23 injury.

24 Let's now turn to 107(b). 107(b), as Your Honor
25 probably is involved with very often in Chapter 11 cases,

1 and you're well aware, the information -- it must contain
2 information that implicates the movant's business
3 operations. Disclosure of the information must reasonably
4 be expected to cause the entity commercial injury.

5 And I'm just quoting a few cases here. The Court
6 must find that the information is so critical to the
7 operations of the entity seeking a protective order that its
8 disclosure will unfairly benefit that entity's competitors.

9 Your Honor, we cited a number of cases that
10 demonstrate when this example is applicable. Georgetown
11 Steel, disclosure of the company's employee's names and
12 salaries, the Court found that it would threaten the
13 debtors;' ongoing business operations and put it at a
14 competitive disadvantage.

15 The Borders case, disclosure of information in the
16 purchase agreement related to vendors, employees, and
17 financial data that also would give competitors an unfair
18 advantage.

19 And, finally, Frontier, disclosure of a list
20 containing the debtors' contractual counterparties would
21 give competitors an unfair advantage. That's the context
22 when you see that argument made and sometimes it works and
23 sometimes it doesn't. But this is not that context.

24 Your Honor, first, it's the individual law firms
25 that have standing to make this argument, not the asbestos

1 claimants which is who the TAC is claiming to represent
2 here. The asbestos claimants don't care about the TAC or
3 the law firms who are here representing themselves today.
4 The individual asbestos claimants had no business operations
5 to be concerned with. Unless Mr. Maclay is going to
6 represent to this Court that he's here before Your Honor
7 representing every law firm who filed these statements, I
8 just don't see how 107(b) would even be argued. It doesn't
9 make any sense.

10 Second, Your Honor, the 2019 statements routinely
11 were disclosed. And we haven't been able to obtain the 2019
12 statements that were filed in a third of the bankruptcy
13 cases that have been filed across the United States. The
14 fact that these 2019 exhibits contain asbestos claimant
15 information as opposed to other types of clients have no
16 bearing on whether this information is commercially
17 sensitive.

18 Certainly the TAC can't now argue that law firms
19 that routinely filed these 2019 statements that were not
20 filed off the electronic document -- docket all of a sudden
21 have relevance and importance greater in these cases because
22 they happen to not be filed on the docket. It is the exact
23 same information with different names and different social
24 security numbers and different diseases, nothing more.

25 The only real argument that the TAC has, putting

1 aside the issue that they're representing law firms when
2 they make that argument, is that the retention agreements
3 are commercially sensitive. And I don't know why they
4 devoted a page to this in their brief because we haven't
5 asked for the retention agreements and we've made that clear
6 from the beginning. But that's really the only argument
7 that they might have.

8 (Pause)

9 MR. AZMAN: Your Honor, that's all I have. I just
10 want to reiterate that Your Honor needs to make a decision
11 under 107 here. 107 trumps the common law. Courts in this
12 circuit have held that. And they have made absolutely no
13 showing, there's no evidence. So we would ask that Your
14 Honor grant the motions and grant our access. Thank you.

15 THE COURT: All right. Thank you, Mr. Azman.

16 Ms. Sieg.

17 MS. SIEG: Your Honor, I had a few follow up points
18 to make and I would like to focus first on your concern
19 about whether the Third Circuit's affirmance of Judge
20 Fitzgerald's original orders have set up a, kind of a
21 binding process.

22 And, Your Honor, what happened in that Third
23 Circuit decision is it affirmed the process for getting
24 these things on file, getting them into the Court. And it
25 said, public access issues will be handled later. If

1 anybody comes in and asks for them that's a separate issue
2 that's got to be determined later.

3 Now in Judge Starke's decision that happened to
4 some extent. Garlock came in to these cases and said, hey,
5 I want access to all these 2019 statements. So Judge Stark
6 was asked to decide, does 107 apply to them. If so, has the
7 presumption of access been rebutted. And he said, no.

8 The second piece of what is now presented to Your
9 Honor for the first time on a contested basis is whether
10 there should be access and, once granted, whether there
11 should be restrictions. The Third Circuit has never said
12 that that is the analysis Your Honor is bound to perform.
13 And I would like to cite to Your Honor two cases from the
14 Third Circuit that actually say, no, Your Honor is not bound
15 by these prior orders.

16 The first is the Miller case and that's at 16 F.3d
17 at 551 and 552. And, Your Honor, there the Third Circuit
18 said, "The public's interest in access judicial documents
19 isn't resolved for all other parties and for all time by
20 injury of one initial order."

21 So this is not the type of situation. Public
22 access issues are not the type of situation where there is a
23 law of the case kind of argument. Your Honor, that -- there
24 is a wealth of case law in the Third Circuit that goes
25 against that proposition.

1 And Your Honor emphasized that Mr. Azman and myself
2 are here today on behalf of specific clients. That is true.
3 I represent Ford Motor Company.

4 THE COURT: Right.

5 MS. SIEG: And the right that Ford is asserting is
6 the right to public access under various theories, primarily
7 Section 107. And, again, I'll point Your Honor to a Third
8 Circuit decision. It's the Bank of America decision at 800
9 F.2d at 345. And the Third Circuit said, the public's
10 interest in accessing judicial documents isn't lessened
11 because they're asserted by a private party and not, for
12 example, a news organization.

13 That -- the identity of the person requesting
14 public access isn't determinative of the kind of access that
15 should be granted. And it's for that reason that the
16 purpose to which the documents are going to be put is not
17 relevant. And, Your Honor, I would just again go back to
18 the language of Section 107 which clearly applies. And it
19 doesn't involve a determination about what the papers are.
20 It says, papers filed in a bankruptcy case. You do not get
21 into a discussion of, well, one judge thinks that this paper
22 doesn't mean anything.

23 Judge Fitzgerald, for example, doesn't think that
24 Rule 2019 statements constitute an assertion of a claim. I
25 disagree with that. Your Honor, we live in the bankruptcy

1 world where defined terms have meaning. Rule 2019 applies
2 to creditors. There is an FCR appointed in cases that are
3 designed to address the interest of future claimants. So
4 future claimants are not required to file 2019 statements.

5 THE COURT: Right.

6 MS. SIEG: Creditors are. And, Your Honor, in the
7 Garlock estimation trial that Court certainly thought that
8 2019 statements have evidentiary value as some evidence that
9 a particular creditors may have been exposed to the products
10 of companies against whom they've filed a Rule 2019
11 statement.

12 SO there are differing views all over the country
13 about the evidentiary value of these. And, of course, that
14 depends on the type of proceeding in which they're intended
15 to be used. But that inquiry is not something that Your
16 Honor has to or can undertake under this Section 107
17 analysis.

18 And, Your Honor, the suggestion that you don't have
19 authority to grant the relief that we're seeking because the
20 Western District of North Carolina has a copy of a CD that
21 was made when Garlock requested these documents I think is a
22 silly proposition. But if that were the case, the binding
23 precedent in that jurisdiction would require release of
24 these Rule 2019 statements. Not these 2019 statements but
25 others were at issue in the Garlock estimation proceeding

1 and that Court held that 2019 statements are subject to the
2 public's right of access and they're not subject to any
3 restrictions.

4 Your Honor, the Rule 29 statements are important.
5 Our opponents today recognize that they impact who can vote
6 on a plan. They are very significant disclosure issues
7 under Rule 2019 and they identify the names of creditors.
8 And, Your Honor, that's all we're here today to find out is
9 who filed 2019 statements in these cases.

10 Your Honor, I'm sorry if I'm skipping around a
11 little bit. I would point out that Mr. Maclay suggests some
12 restrictions on use is required because otherwise there
13 could be identity theft or there could be harassment of
14 these innocent victims. Your Honor, this type of
15 information has existed in the public domain for a couple of
16 years now from the Garlock case on a very, very broad basis.
17 You know, the telephone directory analogy, that exists. The
18 Court published a link to it on its own website, the Western
19 District of North Carolina. So there has been a telephone
20 directory of the alleged innocent victims for years.

21 And there is not a single example before Your Honor
22 of an asbestos creditor or any type of creditor who has been
23 subject to an undue risk of identity theft, not a single
24 example in the whole nation have they been able to come up
25 with today. And this exact type of information has existed

1 in the public domain for a while.

2 And, Your Honor, this ties in, it dovetails with
3 another reason why you shouldn't impose use restrictions on
4 these documents. For example, in the sample ballot that
5 Honeywell attached to one of its pleadings in this case you
6 can see that in eight of the nine cases at issue today the
7 ballots indicate whether certain of those voting creditors
8 had previously filed 2019 statements in this Court.

9 And, Your Honor, those documents are subject to
10 unrestricted use and publication by any member of the public
11 including Ford, including Honeywell. So if Your Honor were
12 to say, Ford and Honeywell, you cannot use evidence of a
13 Rule 29 statement that one of these people filed in one of
14 these cases, that would contradict the fact that that
15 information is already in the public domain to some extent.
16 So that would lead to contradictory results and it would
17 lead to increased litigation.

18 I mean, these are cases for the most part that have
19 been closed for years. And to set up a process where every
20 time someone wants to see these things they have to come
21 back into this Court is a process that would not be
22 sustainable. And it's not required under the Third Circuit
23 precedent for the reasons that I explained when I first
24 stood up a moment ago.

25 Your Honor, I would point out as well that debtors,

1 even asbestos debtors are required to file schedules and
2 statements of financial affairs. Those things require them
3 to list the names and identities of creditors. Those things
4 have been filed not under seal for years and years and years
5 and there has never been a suggestion that schedules of
6 asbestos debtors should be put under seal because these are
7 special creditors who are subject to some heightened risk of
8 identity theft.

9 There are massive Chapter 11 cases where there are
10 thousands and thousands of individual creditors employees,
11 different kind of vendor creditors and none of them, not a
12 single example has been cited where the fact that their
13 identity as a creditor has been disclosed has subjected them
14 to an undue risk of identity theft. And that's not a
15 situation that would be workable in any way, shape or form
16 in Chapter 11 cases for debtors and others to try to figure
17 out which creditors are deserving of some special secrecy in
18 a case. It's just not a workable system.

19 And in terms of the cost for providing public
20 access to these particular documents, I would say, you know,
21 that's a function of what in my view was a faulty process to
22 begin with. But I do have a suggestion that I think would
23 resolve the Court's concern about the cost of granting
24 access. And in the Garlock case when we got access to the
25 giant estimation trial record it was over 2 million pages of

1 documents. There was a concern that, you know, we were
2 supposed to redact the first five digits of social security
3 numbers and medical information, but there was a concern
4 given the volume that something might slip through the
5 cracks.

6 THE COURT: Right.

7 MS. SIEG: And so the order provided if you receive
8 something that should have been redacted, you destroy is,
9 you return it you don't use it. I suggest a similar
10 provision could be appropriate here. We know that a process
11 has already been done to do the appropriate redactions. The
12 concern was, oh, well, we didn't do our QC process. Okay.
13 Well, then if something has slipped through the cracks then
14 that can be destroyed, returned, not used. But that is not
15 a reason to violate the First Amendment and impose very
16 broad use restrictions on the entities that are seeking
17 public access.

18 And, Your Honor, I would just -- this is just a
19 small point, too. Mr. Maclay suggested that further
20 proceedings might be necessary to consider these very
21 important constitutional issues. I would just say that the
22 constitutional issue was implicated by the request for
23 public access. If they have an argument that is supposed by
24 any case law that suggests use restrictions are appropriate
25 they could have presented those in their opposition papers

1 and they didn't. They actually didn't cite any case law
2 other than the Judge Starke decision which I've just
3 explained isn't binding in this regard. They cited no case
4 law that would support Your Honor's imposition of those kind
5 of use restrictions and it would violate a wealth of
6 existing third circuit case law.

7 Unless you have any further questions that
8 concludes my remarks.

9 THE COURT: All right. Thank you, Ms. Sieg.
10 Mr. Maclay.

11 MR. MACLAY: Thank you, Your Honor.

12 Your Honor, first I'll address a question you
13 raised and then I will respond to both a couple of
14 misstatements about my own behavior with respect to this
15 matter as well as some new arguments which weren't addressed
16 initially in the opening statements which I would like to
17 briefly respond to.

18 Your Honor, you had asked the question about, to
19 what extent do you need to find specific facts when
20 evaluating the risk of identity theft and other
21 confidentiality harms.

22 THE COURT: Right.

23 MR. MACLAY: And I would make a couple of points
24 about that question, Your Honor.

25 First, the record in front of Your Honor is the

1 same record that was in front of Judge Starke. And Judge
2 Starke certainly found that record to be sufficient to
3 impose substantial restrictions designed to protect the
4 confidentiality issues.

5 With respect to the kinds of harms that could come
6 about, I will note that 107, which they say governs, talks
7 about an undue risk of harm.

8 Well, implicit in the concept of a risk of harm,
9 Your Honor, is we're talking about things to happen in the
10 future. And when we're talking about things that will
11 happen in the future it's hard to do more than think through
12 what would logically be likely to happen.

13 It's not unreasonable, Your Honor, to think that if
14 people's personally identifying information is released into
15 the public record associated with their disease types,
16 associated with portions of their social security number if
17 not the whole thing, that that would lead to identity theft
18 as the statute specifically mentions, potential Medicare
19 fraud claims brought by other people, potential trust
20 admissions done fraudulently by other people, potential IRS
21 refund claims done by other people. The statute protects
22 personally identifying information because it's so obvious
23 and so clear that these risks exist, Your Honor.

24 In fact, in the Dex Media case that was why the
25 addresses were not provided. Well, the addresses are a

1 portion of what's in these 2019s, Your Honor, these peoples
2 addresses and their names and a portion of their social
3 security numbers and their disease, lots of information
4 which when you put it together can be used for the obvious
5 nefarious purposes of identity thieves or others.

6 And we heard from the movants that we haven't
7 identified any particular identity thief which I found to be
8 a fascinating proposition. I suppose I could go onto some
9 criminal dockets and get you the names of some identity
10 thieves, Your Honor. But as I mentioned in my initial
11 remarks we do know one thing about identity thieves, they
12 exist and they want to open up these documents to the world.
13 So by definition they want to open up these documents to
14 identity thieves. What more proof do you need, Your Honor.
15 It's quite clear.

16 With respect also to the particular facts point,
17 remember something else about these cases. You've heard
18 people tell you they don't need to be reopened. And as a
19 proposition that's general I don't have a problem with that.
20 But the creditor matrices have not been maintained. A lot
21 of the plaintiff's law firms have been dissolved or no
22 longer exist or no longer represent those same claimants.

23 It is certainly fair as a constitutional matter, if
24 you want to talk about the constitution, that there's been
25 no notice to many of these affected individuals. Given

1 that, I think Your Honor should be quite careful before
2 holding an insufficient factual record has been established
3 to protect those elderly, sick, individuals or their widows
4 from potential abuse by whomever, either these Fortune 500
5 companies or the world to which they wish to open up the
6 information.

7 I was accused that I was being disingenuous, Your
8 Honor, because on behalf of the Garlock committee I
9 negotiated a consent order whereas here I don't agree to
10 similar protections according to them.

11 Your Honor, first of all as a legal matter it is a
12 universally understood proposition that consent orders have
13 no precedential value even as to the same parties. And so
14 the idea that the Narco TAC would be adversely affected
15 because I'm the lawyer representing them is odious, contrary
16 to law and supported by no precedent whatsoever. And the
17 concept that I am being tersely disingenuous for
18 representing my client's interest here is offensive, Your
19 Honor, and I take offense to it.

20 The point is the Garlock case was a quite different
21 case with a whole lot of different factors. And if I were
22 free to disclose my client's confidences I could explain
23 some of the differences, but I can't. But I can say they
24 exist and that's why the law is quite clear that it's
25 irrelevant here. They have no -- what happened there has no

1 precedential effect, period. That's just a legal principal
2 which is unrebutted.

3 With respect to their desire to open it up to the
4 world they say because they collaborate with other people.
5 Your Honor, Judge Stark said you can't use this information
6 except in the aggregate that doesn't identify any individual
7 people. Their express purpose to collaborate with various
8 unidentified other people potentially including Ford to
9 pursue these individuals is -- flies in the face of Judge
10 Starke's order.

11 And it's very interesting that when you saw their
12 original papers they were quite careful not to say that they
13 were actually asking your order to essentially reverse Judge
14 Starke's decision or at least ignore the restrictions that
15 were baked into his ruling. But it's become quite clear,
16 Your Honor, if there was any doubt about that that that's
17 exactly what they're saying. They're not saying, do what
18 Judge Starke did. They're saying don't do what Judge Starke
19 did because if you did do what Judge Starke did they
20 wouldn't get these documents or if they did it would be
21 constrained to a very narrow purpose not to be used against
22 individuals.

23 It's interesting. They argue that some 2019s for
24 the first time in reply have already been out there so why -
25 - why have there not already been harms from that. Well,

1 Your Honor, the answer is simply. There were three 3300 CVs
2 with hundreds of thousands of people. It's quite possible
3 there have been people whose identities have been stolen.
4 How would we know? The volume is so vast it's impossible to
5 know for sure.

6 But we know there's a risk of it and that's what
7 the statute and the common law look to, the risk. The risk
8 is clear as you said in Dex Media. Home addresses are
9 something which can be misused. That's why you didn't
10 permit it to be done there and you said, I think in the
11 present day with the abuse of private information that those
12 addresses need to be redacted.

13 The same thing is true here, Your Honor. You don't
14 -- it's not overly speculative to say that identity theft
15 exists. In fact, it's noted in the statute as a basis for
16 your Court's decision. And so the idea that we need to
17 identity particular identity thieves is just unsupportable.

18 This concept that we don't represent law firms and,
19 therefore, we can't speak for their interest with respect to
20 107(b) is an interesting argument. It's never been in any
21 of their briefs. If it had been perhaps we would have more
22 law firms here represented by separate counsel.

23 But what I do know, Your Honor, is that when Judge
24 Starke made his ruling he did so on the basis and in part of
25 the committee's representations that those law firms'

1 interests were affected. T he law firms' interests are
2 clearly comingled with those of their constituents.

3 And to the extent they're trying to make a standing
4 argument it's too late to do so now, Your Honor. And if
5 they wanted to make a standing argument it should have been
6 in their briefs and we would have responded to it
7 appropriately. But the fact is the interest of the asbestos
8 constituency is interlinked with the interests of their law
9 firms and I believe that on behalf of the Narco TAC I have
10 standing to speak to both, and if they didn't think that
11 they should have made it part of their standing objection
12 which they didn't do.

13 Now with respect to the Miller case that Ms. Sieg
14 was -- reacted to --

15 THE COURT: Yes.

16 MR. MACLAY: -- in her reply remarks, (a), Your
17 Honor, I believe she misstated that case which I fortunately
18 happen to have with me. And, two, before I get to the quote
19 from the case which I think is most pertinent, Judge Starke
20 held expressly in his opinion that the Rule 2019 orders
21 initially entered by Judge Fitzgerald were not subject to
22 collateral attack. He ruled that out in his order.

23 THE COURT: Correct.

24 MR. MACLAY: So o what she's saying now is
25 basically ignore his ruling on that point, open them up to

1 collateral attack. I don't think that's consistent with the
2 law and it's certainly not consistent with the law of this
3 case.

4 Now from the Miller case, Your Honor, there's this
5 quote and this is 551 to 552 of that case:

6 "Even if the initial sealing was justified, when
7 there is a subsequent motion to remove such a seal the
8 District Court should closely examine whether circumstances
9 have changed sufficiently to allow the presumption allowing
10 access to court records to prevail."

11 So it is certainly true, Your Honor, that they can
12 bring this motion. They have brought this motion. Here
13 they are in front of Your Honor. That's all the Miller case
14 says. It doesn't say that nothing that happened before is
15 relevant. Of course they're here. They have the right to
16 ask for the documents. That's what they've done. But that
17 doesn't mean they automatically get the documents. It
18 doesn't mean that all the prior precedent in this
19 jurisdiction is irrelevant. It's all quite relevant as
20 Judge Starke recognized.

21 And there are a number of times that you have heard
22 from the movants about what happened in Garlock. What
23 happened in Garlock, again, was a consent order. That's all
24 there was. There was no ruling by Judge Hodges independent
25 of the consent order. It was just a consent order. It has

1 no precedential value, so just keep that in mind every time
2 they talk about what happened in Garlock. It's legally
3 irrelevant.

4 And the concept that Judge Starke thought the 2019s
5 were relevant, I don't understand where that comes from
6 because we've already told you, Your Honor, that the 2019s
7 were not addressed in his decision. So I guess they purport
8 to read Judge Hodges' mind because that's the only way they
9 could make that statement. It's not in his decision.

10 The 2019 statements themselves are not part of any
11 phone directory. As I mentioned they were never provided to
12 the Court. So, clearly, whatever link Ms. Sieg was talking
13 about it does not contain these documents and this
14 information. And the Supreme Court has said and it's
15 un rebutted by the other side that the fact that some
16 information in certain documents may be available in other
17 forums does not remove their privacy protections here. Your
18 Honor has to consider the privacy protections in these
19 documents before Your Honor that are the subject of this
20 motion.

21 THE COURT: Does 107 trump the common law, Mr.
22 Maclay?

23 MR. MACLAY: Not in this case, Your Honor. In
24 fact, I would say generally not. But that isn't something
25 that's been clearly briefed by the other side because they

1 lead off with the common law. Now they want you -- to tell
2 you it's irrelevant. It's interesting it's more than half
3 of their briefs.

4 So the short answer, Your Honor, is no. But even
5 if it did it wouldn't matter because the similar analysis
6 applies as I laid out in my initial remarks. And there are
7 numerous cases, Your Honor, that -- as I mentioned in my
8 initial remarks.

9 For example, look at purpose under 107 and do a
10 sort of balancing test under 107. The Kaiser District Court
11 in this very -- one of these very cases did that. So it --
12 I think it's clear that with respect to the current dispute
13 in front of Your Honor 107 does not sort of belie the common
14 law protections, especially given their reliance on the
15 common law. Although I ultimately do believe the analysis
16 would b the same under 107 as I've laid out.

17 Ms. Sieg made an interesting argument for the first
18 time today about bankruptcy schedules and about how they
19 contain some of this information.

20 Well, first of all, that's already addressed by
21 what I've just said about the Supreme Court. It doesn't
22 matter if it's already available in some form. But I will
23 note, for example, in a piece of paper that I just happen to
24 be hopefully handed by one of my co-counsel here today, that
25 there are cases that have the debtors redact things from the

1 schedules because of personally identifying information.
2 For example, in the SCF Entertainment case, 16-10238
3 Bankruptcy -- the Bankruptcy District Court of Delaware
4 authorized the debtors to file schedules and statements with
5 redactions of the names of creditors and the addresses of
6 the employees.

7 And so, frankly, that point undercuts their
8 position here, Your Honor. It's not required to be in the
9 schedules always. It depends. Sometimes it's precluded
10 from being on those schedules.

11 So to make sort of a summation here, Your Honor,
12 Judge Starke only gave access to the 2019 exhibits under
13 very stringent conditions limited to very narrow purposes.
14 And they've acknowledged that a purpose is to be different
15 than those purposes in a way which is odious and contrary to
16 the law and Judge Starke's reasoning.

17 So if Your Honor were to follow Judge Starke's
18 reasoning you would either not all the production at all or
19 you would only allow it to be used with respect to the
20 particular proceeding in front of the Western District of
21 Pennsylvania with respect to cross processing subject to a
22 protective order to be issued by that court and --

23 THE COURT: What --

24 MR. MACLAY: -- and all the other limitations that
25 Judge Starke imposed.

1 Thank you, Your Honor.

2 THE COURT: Thank you. Thank you, Mr. Maclay.

3 Yes.

4 MS. SIEG: Yes. Just briefly. I just realized
5 there may have been a confusion between the two types of
6 previous Garlock orders that we've been talking about.

7 THE COURT: All right.

8 MS. SIEG: One was the consent order that granted
9 public access to the Garlic Rule 29 statements. The other
10 order, which was not by consent, which was on a fully
11 contested basis was where the Bankruptcy Court supported by
12 a prior ruling by that District Court held that all of the
13 estimation trial evidence was subject to the public right of
14 access and shouldn't be subject to any use restrictions
15 included in that estimation trial evidence or 2019
16 statements filed in other cases.

17 And that Court held that the 2019 statements did
18 have some evidentiary value and that was part of the reason
19 why public access was granted because these things were
20 introduced at trial. They were filed in the court. They
21 were subject to 107.

22 So there were -- I wanted to clarify that there are
23 two prior Garlock orders, one of which was done by consent -
24 -

25 THE COURT: When was that in relationship to the

1 second?

2 MS. SIEG: To the -- I'm sorry.

3 THE COURT: To the district court ruling?

4 MS. SIEG: Well, the district court in the summer
5 of 2014 held that the bankruptcy court in North Carolina had
6 erred when it initially allowed all of the trial evidence to
7 come in under seal. It said that that was totally
8 inappropriate and the public has a right of access to these
9 documents. It remanded the case to the bankruptcy court to
10 allow it to issue a ruling granting public access subject to
11 restrictions of the type that are set forth and requirement
12 in Bankruptcy Rule 9037.

13 And then after that litigation which was on remand
14 in the bankruptcy court, that resulted in the order on a
15 fully contested basis where the Court held that all of the
16 estimation trial evidence including certain 2019 statements
17 are subject to the right of public accessed.

18 Your Honor, one additional clarifying point. Mr.
19 Maclay just suggested that use be restricted to this other
20 proceeding in Pennsylvania. Ford's not a party of that.
21 That would be a totally useless proposition from Ford's
22 perspective. And it -- again, for all the reasons I've said
23 it's not supported in the case law.

24 I would like to make one --

25 THE COURT: What is Ford's purpose?

1 MS. SIEG: Ford's purpose is to see who the
2 creditors were in these cases. It's as simple as that.
3 These are papers that were filed in these cases and we're
4 interested to see who the creditors were who filed 2019
5 statements. Ford may have a myriad of other purposes that
6 it will, you know, think about and do over the coming years.

7 I mean, I don't think I'll represent Ford for the
8 remainder of my life as much as I would hope that I do. But
9 they -- I mean, the -- I am not capable of describing all of
10 the various different purposes that one day these things
11 might be useful for. And people disagree about their value,
12 but that doesn't have any significance in terms of what the
13 public is entitled to access to under 107.

14 And I would just point out again, I think I've made
15 this clear. The Garlock court in its estimation decision
16 did, in fact rely on 2019 statements as alternative exposure
17 evidence. And I -- we don't need to dwell on that, but the
18 Court did use these things. It didn't cite them in its
19 estimation opinion only because it was still operating under
20 the erroneous orders that required all this stuff to be
21 sealed. That's why they're not cited in the opinion because
22 it took millions of dollars and years of litigation to get
23 those things unsealed as they should have been from the
24 beginning.

25 And lastly the case that was just cited about the

1 one court that did allow some sealing of certain creditor
2 information and schedules, that case involved -- I think
3 that involved an involuntary petition. I'm not sure on
4 that. But regardless of what it -- whether it was voluntary
5 or involuntary there was a specific finding that a director
6 competitor of the debtor could exploit the identity of the
7 creditors in order to get a competitive advantage.

8 And so 107(b) was supported by specific evidence in
9 that case and that is totally lacking from what we have
10 here. There is no, as Mr. Azman pointed out, there is no
11 competitive advantage from people finding out who the
12 creditors were in these nine cases.

13 Thank you, Your Honor.

14 THE COURT: Thank you, Ms. Sieg.

15 MR. AZMAN: Your Honor, Darren Azman again. Just a
16 few points in rebuttal.

17 The restrictions in Garlock by Judge Starke were
18 consensual. We cited it in our reply brief, but I'll quote
19 just some of the language from the transcript. This is
20 Judge Hodges speaking: "There" -- and there's a couple of
21 typos from what he's -- what the transcript says:

22 "There is a couple of references, at least one in
23 your reply brief" -- and this is him talking to Garlock's
24 counsel -- "and I think one of the appellees also about
25 whether the Court could or should impose any confidentiality

1 limitations if you were to prevail in this appeal. I wasn't
2 sure whether I should infer from the argument in your reply
3 that Garlock would be open as a condition of obtaining some
4 access to some of these exhibits, to have some type of
5 restriction imposed on its use. Is that something Garlock
6 is offering or not?"

7 In response, Garlock's counsel:

8 "Yes. We did offer that below, Your Honor. We
9 think that once the Court finds that there is some serious
10 injury that could be rendered that doesn't end the question.
11 The Court at that point can tell of the disclosures to avoid
12 that injury."

13 Now here we don't think that there is an injury,
14 but we did offer that we would keep the information
15 confidential. It was consensual. That's the only reason
16 why there's anything in that opinion about the need to
17 restrict access.

18 Now in terms of not granting anyone by Ford and
19 Honeywell access to the 2019 exhibits I will read from Judge
20 Starke's opinion:

21 "The sharing of information among litigants may
22 help promote fairness and efficiency. Also favoring access
23 is that the issues involved here going to liabilities
24 arising from a mass tort are important to the public."

25 Your Honor, sunshine is the best disinfectant.

1 That is our view and I know that that's Ford's view and
2 other asbestos defendants.

3 Now let's talk about what harm has happened. Your
4 Honor, this info has already been out there for many years.
5 Nothing has happened. And how would we know if this harm is
6 what Mr. Maclay suggests. Did you ask -- did he ask any of
7 his purported constituents who he represents/ Is there a
8 declaration? Is there even a declaration that says from a
9 clamant, Your Honor, I don't know that there's actually harm
10 or that there will be, but I'm fearful there's going to be
11 some type of harm. There's not even the most basic type of
12 evidence. And last time I checked unsubstantiated
13 statements by counsel is not evidence.

14 And that's all you have, Your Honor.
15 Unsubstantiated statements that don't even articulate the
16 degree that is necessary of harm in order to find that one
17 of the 107 exceptions applies.

18 Mr. Maclay cited some broad arguments about
19 Medicare fraud would apply. You know, that argument could
20 be made with respect to any type of information that's in
21 the public domain. Whether it's schedules as Ms. Sieg
22 pointed out of creditors names or whether it's the 2019
23 exhibit information or the very complaints that asbestos
24 claimants file in State and Federal courts. So I just don't
25 see how that argument cuts it or makes any sense.

1 I want to briefly address the notice argument. Mr.
2 Maclay briefly in passing and he did this in his brief as
3 well mentioned, well, maybe nobody got notice and there's
4 not sufficient notice.

5 Your Honor is familiar with Epiq Bankruptcy
6 Solutions I presume. Epiq does a significant amount of
7 noticing for Chapter 11 cases and that's who we retained to
8 go out and figure out addresses of every law firm that found
9 -- that filed a 2019 exhibit. We didn't just look on the
10 docket. You know, as many people have recognized these
11 cases are old and we realize that. But we did -- we went
12 above and beyond. We spent a significant amount of money to
13 look at websites of these law firms to see who is still
14 there, who's not there, who was in the case. And every
15 single law firm that we could figure out got notice of this
16 motion.

17 So notice is just not an issue and they have not
18 presented any evidence as to somebody who may not have
19 received notice.

20 Now Mr. Maclay talks about their being differences
21 between Garlock and this case. He negotiated the order in
22 Garlock. The 2019 exhibits that were filed in Garlock which
23 we're happy to present to the court because that order
24 allows us to do that, they're no different than the 2019
25 exhibits that were filed in these cases or any of the other

1 cases where we have been able to obtain the 2019 exhibits.

2 So I know he's eluding to some facts that he thinks
3 may be different and because of the attorney/client
4 privilege he can't disclose it, but I don't know what he
5 could possibly be talking about. The information is exactly
6 the same. The fact is he negotiated an order for the same
7 type of information in Garlock that we now have before Your
8 Honor and it is -- and I will repeat it. It is disingenuous
9 and I understand he takes offense to that, but I don't see
10 how that is not disingenuous that he negotiated an order
11 that is exactly the same as we're asking Your Honor to enter
12 today.

13 Lastly, Your Honor, you've heard a number of
14 attorneys on the other side talk about our pursuit of
15 individual asbestos claimants. What you haven't heard, Your
16 Honor, is anything about maybe a pursuit against law firms.
17 And you know what? That's actually already been done.
18 There are a number of RICO actions that have been filed by
19 Garlock against law firms including Walters & Kraus because
20 counsel is here today.

21 So let's not make this about law -- litigation
22 against individual defendants. There are a number of uses
23 and it's not just that.

24 That's all I have, Your Honor.

25 THE COURT: All right.

1 MR. MACLAY: Your Honor, I hadn't expected that
2 today we would be talking so much about a different case as
3 opposed to what Judge Starke did in these cases, but I will
4 tell you a couple of facts about the Garlock case to shed
5 some light on what you've been told today.

6 The 2019s that the other side has talked about were
7 for 15 designated claimants as opposed to hundreds of
8 thousands. And they were cherry-picked by the debtor, of
9 course, because it was part of its attempt to make certain
10 arguments. As I mentioned Judge Hodges didn't rely on them
11 at all. And when they were added into the estimation record
12 which was itself made public they were redacted of all sorts
13 of information including diagnosis, date et cetera. So even
14 if they were relevant in any way the arguments that have
15 been made on their basis -- on the basis of them are false.

16 But moreover Judge Starke in these very cases
17 already said that these are worthy of privacy protection.
18 We don't need to look at what other courts have done, Your
19 Honor. Look at these cases and Judge Starke's decision.

20 The concept that we on behalf of the Narco TAC
21 should have gone to the homes presumably of these widows or
22 dying elderly victims of asbestos is odious, Your Honor, for
23 the reason I mentioned before. (A) we represent the
24 interests of all of them collectively, but moreover, Your
25 Honor, you -- would it really have benefited Your Honor to

1 have a declaration from some elderly widow that she is
2 afraid of identity theft. I guarantee you I could produce a
3 thousand of those, Your Honor, because it's obvious. Of
4 course there's a risk of identity theft and of course people
5 would be concerned about it if it were brought to their
6 attention.

7 But this notice issue that the other side just so
8 cavalierly dismissed is a real one. They said -- and by the
9 way the concept that lawyer statements are not evidence, but
10 then his lawyer statement that we did everything we could do
11 for notice, there's no evidence of any of that. And if this
12 were really an issue we should get some evidence on that. I
13 would love to see it.

14 But the reality is a lot of those law firms don't
15 exist. A lot of those law firms would no longer represent
16 those people. These cases that have been closed in some
17 cases for ten years, the creditor matrices have not been
18 maintained. There is no ability of this Court or any court
19 to say these individuals have gotten any kind of sufficient
20 notice. And that is why Your Honor should keep that in mind
21 when undertaking the analysis and be very skeptical of those
22 sorts of attacks.

23 And if Your Honor did believe a further evidentiary
24 proceeding were necessary we've already suggested Judge
25 Fitzgerald in that role in our papers which is a point I

1 guess we'll get to next.

2 That's all I have, Your Honor.

3 THE COURT: All right.

4 MR. AZMAN: Your Honor, two very brief -- I'll be
5 less than a minute.

6 THE COURT: Less than a minute. Okay.

7 MR. AZMAN: Less than a minute.

8 It was not 15 claimants whose information was
9 disclosed. We got access to hundreds of 2019 exhibits. Mr.
10 MacLay is talking about the evidentiary record excluding the
11 2019 exhibits. So 2019 exhibits, we got all of them, lots
12 of information, the same stuff we're seeking here.

13 Second, on the notice issue the evidence is in the
14 record, Your Honor. Epiq filed affidavits of declaration
15 like they do in every single case and Mr. MacLay has not
16 filed anything that attacks whether or not notice was
17 sufficient other than the statements he just made. So
18 unless -- it's not the -- the burden is not on me after a
19 declaration has been filed to further substantiate that. So
20 that's already been done.

21 THE COURT: All right. All right.

22 Well, let's turn to Judge Fitzgerald and a motion
23 for a referee special master and Judge Fitzgerald's role.

24 MR. MACLAY: Thank you, Your Honor.

25 THE COURT: Yes.

1 MR. MACLAY: And I'm pleased to report to Your
2 Honor that at least from our perspective this portion of the
3 argument will be relatively brief because I think the issue
4 is simple. Judge Fitzgerald would make sense here as a Rule
5 2019 expert and referee because she was the judge for almost
6 all of the asbestos bankruptcies in the Third Circuit
7 including all of the cases in front of Your Honor.

8 THE COURT: Right.

9 MR. MACLAY: She drafted the orders that Your Honor
10 has been called upon to implement. Their motion
11 (indiscernible) pursuant to the orders she entered. She
12 also -- they focused attention on the fact she issued an
13 initial decision which was reversed by Judge Starke. But
14 after that she implemented his decision. She entered a
15 protocol order on remand in, again, all nine of these cases
16 providing and putting, you know, flesh on the bones of the
17 limited access that Garlock was being provided for
18 particular uses.

19 THE COURT: But why do I need her?

20 MR. MACLAY: Well, Your Honor, whether or not you
21 need her is ultimately your decision. And I don't want to
22 propose to tell Your Honor that you need her or anyone else.
23 Why she would be helpful, though, I think is the legal test
24 for whether Your Honor would want to appoint an expert or
25 other court-appointed referee position.

1 And I think the way she might be helpful to Your
2 Honor is that if you decide to order any kind of disclosure
3 of this, and if Your Honor decides not to you might not need
4 her. If you think they haven't established a proper purpose
5 or their purposes are too broad or they're violating Judge
6 Starke's restrictions, all of which I think are true, then I
7 think you may not need her.

8 But because of her knowledge of the documents,
9 because of her knowledge of the order, because of her
10 knowledge of the background, because of her knowledge of the
11 claimant, because of her knowledge of the course of all of
12 these asbestos bankruptcies I think she could provide
13 assistance to Your Honor in thinking through the risks, and
14 thinking through the legitimacy of the uses, and thinking
15 through the practicality of how to implement Judge Starke's
16 decision. And she has already done that in the implementing
17 order. But ultimately it's up to Your Honor whether you
18 think she'll be useful to you.

19 But what you heard at the status conference from
20 Honeywell was that she had a conflict and they were quite
21 convinced that she had a conflict. And we told Your Honor,
22 Your Honor, we've done some research. We can't find any
23 cases. And then you authorized them to file a supplemental
24 brief on the conflict issue. The transcript was quite
25 clear, on the conflict issue.

1 And what you got from them, Your Honor, didn't even
2 mention the word conflict I don't believe. It certainly
3 didn't make a conflict argument. There is no conflict. The
4 only real basis that they have proposed to not have her be
5 used by Your Honor is the fact that she is conflicted -- she
6 gave Your Honor a letter which also made clear she had an
7 expert look into this. There's no conflict.

8 So given that there's no conflict, given that she's
9 available to serve as she made clear in her letter, too, and
10 given that she has a lot of relevant knowledge both
11 factually and just experientially through the cases as well
12 as potentially legally, Your Honor may not need her, but I
13 think she'll be useful to Your Honor. And what I would
14 suggest Your Honor do as I mentioned at the last status
15 conference is just pick up the phone and call her.
16 Honeywell seems to have some objection to that, but there's
17 no legal basis for that objection. Honeywell would have no
18 objection -- no ability to object to your consulting with
19 your own court retained expert.

20 So it seems to me as night follows day, Your Honor,
21 you should be free to reach out to such a person and discuss
22 with them whether their appointment would be useful to you.
23 And that's what I would suggest you do if you have any
24 particular uncertainties as to whether she would be useful.

25 So because of her long-standing experience with

1 these cases and these exact issues and these exact documents
2 as well as Mr. Shineman who, in fact, implemented this
3 process before it just seems logical. How could she not be
4 helpful? And given that the primary purpose in their
5 initial paper at least that Honeywell put forward was to be
6 used essentially in front of her, Your Honor, in the Narco
7 mediation, that's just another reason why she would seem to
8 be a good fit for the process.

9 And that's, Your Honor, what I have to say about
10 that.

11 THE COURT: All right. Thank you, Mr. Maclay.

12 Mr. Azman.

13 MR. AZMAN: Well, I think the one thing we can
14 agree on is we're both going to be fairly short on this,
15 fortunately. Why do I need her? That's a great question,
16 Your Honor. We've been wondering the same thing for the
17 past couple of months, why do you need her. There's no role
18 for a 2019 expert and referee. This isn't an intellectual
19 property matter. This isn't some novel area that Your Honor
20 is not capable of adjudicating.

21 Your Honor is more than familiar with reading case
22 law and understanding the history of 2019, and I think the
23 parties, including Mr. Maclay, have done an adequate job of
24 informing Your Honor of the history in these cases. There's
25 case law directly on point in these cases. Again, this is

1 not novel.

2 Your Honor, there's no compelling arguments on the
3 access motions and it's not surprising because there really
4 are none. The issues have already been decided. But
5 naturally as any good lawyer would do they attack though,
6 what other avenues do I have to do something about this, and
7 they threw up a hail Mary and they filed a referee motion.
8 I'm not saying it's not something I would have thought of or
9 tried to do. I don't blame them. But the fact is, is that
10 there is no role for a referee in this case. It just
11 doesn't make any sense.

12 Now let me talk about the substance of why Judge
13 Fitzgerald should not and cannot be appointed. Ex parte
14 communications, we've had them with Judge Fitzgerald
15 specifically related to the access motions, the substance.
16 And I'm not just talking about the ability or whether she
17 has a conflict or not. There were ex parte communications
18 on that level as well.

19 But I want to clarify there were communications
20 with Fitzgerald and these were not on our own doing and this
21 was before the referee motion was filed. So it had nothing
22 to do with, you know, preparing to make this type of
23 argument. The fact is those conversations took place.

24 THE COURT: Now on access to the 2019 exhibits?

25 MR. AZMAN: Yes, Your Honor. Substantive --

1 THE COURT: Okay.

2 MR. AZMAN: -- and I can't go into details --

3 THE COURT: No. No.

4 MR. AZMAN: -- because of confidentiality, but we -
5 -

6 THE COURT: Understood.

7 MR. AZMAN: -- we did think it was important to
8 raise that.

9 Now here's a question. Has the TAC had those ex
10 parte communications? Well, you know, we raised that
11 question and we pointed out that upon information and belief
12 they have. We don't know for sure, but that's our belief.
13 You didn't hear Mr. Maclay rebut that. He didn't file a
14 surreply even though Your Honor said that he could ask for
15 that. And he hasn't stood up and said anything about
16 whether they've had ex parte communications.

17 But it's interesting, Your Honor, why are they so
18 bent on getting Judge Fitzgerald appointed as a referee to
19 decide these motions. It doesn't make a whole lot of sense
20 and that leads to only one conclusion. They've had some
21 conversations with her that make it pretty clear maybe she's
22 a little bit favorable to what the TAC is asking for here.
23 And I don't really see any other way one could view what's
24 going on here other than that.

25 But I'm open to hearing other arguments that Mr.

1 Maclay may have for why they so desperately want her to
2 adjudicate these motions.

3 Now let's talk about Judge Fitzgerald's own
4 response to Your Honor's letter --

5 THE COURT: Yes.

6 MR. AZMAN: -- and we appreciate you sending that
7 response.

8 THE COURT: And I've had no conversations with her.
9 That's the -- the letters are the sole communications.

10 MR. AZMAN: I appreciate Your Honor letting me
11 know. And I know Mr. Maclay cavalierly said why don't you
12 just pick up the phone. I don't know that Your Honor can do
13 that, but you're welcome to if you think that's appropriate
14 before you've decided the referee motion.

15 I'm going to read two quotes. They're the most
16 relevant quotes in my view on the referee motion. "I have
17 concerns relating to the Narco mediation." That's one. "If
18 any party to the Narco mediation is not comfortable with my
19 serving as a referee for the Court I believe it would be
20 very difficult for me to help the parties achieve a
21 resolution."

22 I don't really have much more other than those two
23 quotes. I think they speak for themselves. Judge
24 Fitzgerald sees a problem, whether it's a formal conflict or
25 not, you know, that's a totally separate issue. She sees

1 this being a problem for the parties to reach a resolution
2 both on this matter and in the Narco mediation that is
3 ongoing.

4 Finally, Your Honor, as we noted in our papers Mr.
5 Maclay did state at the scheduling conference that if Judge
6 Fitzgerald for whatever reason is unable or unwilling to
7 accept the appointment we would withdraw the request. I'm
8 not -- I don't think that she, you know, said she's
9 unwilling to do it. I'm not saying that he was obligated to
10 withdraw the request. But I do think that those two quotes
11 that I just read to Your Honor were just about as close as
12 you can get to saying what needed to be said for them to
13 withdraw the motion. And we asked them to withdraw the
14 motion and they didn't.

15 So, Your Honor, again, there really is no need for
16 Your Honor to farm this issue out to Judge Fitzgerald as a
17 so-called 2019 expert. And with that, Your Honor, I'll
18 rest.

19 THE COURT: All right.

20 MR. AZMAN: Thank you.

21 THE COURT: Thank you, Mr. Azman.

22 MR. HARRON: Just two things, Your Honor, very
23 briefly. Again, for the record Ed Harron --

24 THE COURT: Yes.

25 MR. HARRON: -- for the Narco future claims

1 representatives. I was on the calls with Judge Fitzgerald
2 where we addressed her mediating or advising the Court on
3 this issue. There were no discussions of the substance of
4 dispute except consistent with what was in her letter. She
5 did articulate that she believed, notwithstanding a prior --
6 her own prior rulings and her experience as a judge enabled
7 her to evaluate the laws that exist today and make objective
8 -- and exercise objective and independent judgment. That's
9 all she stated. It's the same thing that's in her letter.

10 And how Judge Fitzgerald may be able to assist you
11 --

12 THE COURT: Yes.

13 MR. HARRON: -- I've mentioned, Your Honor, she's
14 lived these cases. The terms of the Narco Trust
15 distribution procedures were negotiated and litigated in her
16 courtroom. The audit provision on which Honeywell relies in
17 large measure for the -- its purpose to obtain these
18 documents, that was a central focus of that bankruptcy case.
19 She's familiar with the breadth of those audit rides and it
20 is, to be candid, it's a focus of the mediation that she's
21 involved with today.

22 So I think to the extent Your Honor is inclined to
23 engage in a balancing test, to the extent Your Honor has
24 decided that Honeywell has met its burden, that it's
25 entitled to something, Judge Fitzgerald's familiarity with

1 the audit rides, with the TEP, and with claimant information
2 in general could assist you in evaluating exactly what that
3 something should be and designing an order that allows them
4 to achieve their legitimate interests while not
5 (indiscernible) on the privacy concerns of the claimants.

6 THE COURT: All right. Thank you, Mr. Harron.

7 Ms. Sieg.

8 MS. SIEG: Thank you, Your Honor.

9 Judge -- former Judge Fitzgerald's close
10 involvement in all of these prior issues and all of the
11 numerous ex parte conversations she's apparently had about
12 2019 issues really gives Ford very great pause as to whether
13 she individually would be appropriate to the extent this
14 notion were even permissible.

15 Your Honor, we've cited in our paper, you know,
16 there is a statute that prohibits the recall of judges who
17 have returned to private practice. They're asking that she
18 be appointed to issue a report and recommendation like a
19 magistrate judge would do. That's totally inappropriate.
20 And former Judge Fitzgerald individually probably would not
21 be the best choice for someone who is impartial. We've
22 heard today that she has a lot of very strong views on 2019
23 issues.

24 And, Your Honor, I think the sort of silliness of
25 this exercise could be illustrated by thinking of some other

1 judges with significant asbestos experience that could be
2 selected. For example, Judge -- former Judge Hodges who
3 presided over the estimation trial in Garlock has a lot of
4 significant experience and some very strong views on what
5 2019s mean. Perhaps he should be appointed.

6 Or former Judge Schmidt who presided over the very
7 largest environmental and asbestos bankruptcy case that is -
8 - that was still pending and he was presiding over that case
9 for almost a decade, has a lot of significant experience.

10 And I would like to bring to Your Honor's attention
11 a recent issue that arose within the Southern District of
12 Texas on a very similar issue. A former judge, former
13 bankruptcy judge took a view in an active case about the
14 propriety of certain things that had happened on his watch
15 as a judge in some of his cases and the entire district
16 court, the entire Southern District of Texas jointly issued
17 an opinion admonishing that former judge from taking a
18 position in active litigation.

19 So, Your Honor, this is inappropriate on a number
20 of levels, particularly -- and no disrespect meant for
21 former Judge Fitzgerald. It's not necessary. I would like
22 to read a quote that I have enjoyed reading very much as we
23 were preparing this. And it's from the D.C. Circuit and it
24 says, "Each courtroom comes equipped with a legal expert
25 called a judge." We have that here. This is a very simple

1 statute with simple language. The law is settled. The
2 redactions have already been done. There's not even a need
3 for a special master to undertake, you know, the
4 administrative role of implementing what this Court's order
5 might be in regard to the type of information that should be
6 released.

7 So we do not think that this is an appropriate
8 exercise, and I'll emphasize again a very good decision from
9 the Fourth Circuit, *Company Dough*, where it emphasizes that
10 each passing day is a separate injury where the public is
11 denied its right of access. This process would just
12 perpetuate the injuries that are already happening and it's
13 not necessary and it adds an additional cost, a condition on
14 public access that Section 107 doesn't count.

15 And we've pointed out in our paper as well that
16 there's a lot of existing case law within the Third Circuit
17 and elsewhere that provides court ordered arbitration is
18 itself subject to the public right of access.

19 So this notion is just multiplying proceedings on
20 proceedings and would be inappropriate on so many levels.
21 And we do oppose that request.

22 Thank you, Your Honor.

23 THE COURT: Thank you, Ms. Sieg.

24 MR. MACLAY: Just very briefly, Your Honor.

25 THE COURT: Yes.

1 MR. MACLAY: Your Honor, there is no argument that
2 if Judge Fitzgerald were still a judge that she would be
3 hearing all of these cases and there would be no legitimate
4 argument that she would be precluded from doing so because
5 of whatever opinions she may hold. She made clear in her
6 letter that she understands Judge Starke's ruling. She
7 implemented it on remand and she would comply with it. So
8 the suggestion that she's somehow biased in a way which
9 precludes her being involved is unsupported by the law, Your
10 Honor.

11 And I agree with something that Mr. Azman said. He
12 told Your Honor that you could pick up the phone and call
13 her. Well, I think the parties are in agreement. Just pick
14 up the phone and call her and decide for yourself --

15 THE COURT: I don't think Mr. Azman said that.

16 MR. AZMAN: No. It's quite the opposite of what I
17 said.

18 MR. MACLAY: Oh, I thought that's what he said,
19 Your Honor.

20 THE COURT: No.

21 MR. AZMAN: No. I said that would be
22 inappropriate.

23 MR. MACLAY: Oh, okay. Well, then let me rephrase
24 what I just said, Your Honor. I misheard Mr. Azman.
25 Although Mr. Azman does not think that would be appropriate,

1 he has provided no legal basis --

2 (Laughter)

3 MR. MACLAY: -- to preclude that call and as the
4 matter of logic, Your Honor, if Your Honor had any questions
5 about her willingness to serve or ability to do so without
6 being adversely affected by her knowledge you could
7 certainly call her and figure that out. She's a former
8 judge and I don't think anyone here has intentionally at
9 least attacked her integrity. I know we certainly haven't.

10 And you've heard from Mr. Harron that apparently
11 the only substantive conversations about the 2019s have come
12 from the other side because the people handling that on our
13 side are Todd Phillips and myself, Your Honor. We haven't
14 talked with Judge Fitzgerald. I believe Leslie Kelleher
15 from our firm has, possibly Mr. Weiner who is behind me in
16 the pews.

17 But we have not engaged in apparently the level of
18 conversation that Honeywell has, but we're still okay with
19 it if Your Honor thinks it's useful because we believe in
20 her integrity. We don't think that she would be adversely
21 affected by such communications, nor do we think they were
22 inappropriate as recognized by Honeywell.

23 So long story short, Your Honor, she would be the
24 most helpful person because of her long-time experience in
25 these cases on these 2019 issues. And if Your Honor thought

1 it would be appropriate and helpful to you we would urge you
2 to pick up the phone and call her.

3 Thank you, Your Honor.

4 THE COURT: All right. Thank you.

5 Well, I -- look, I have no question relating to
6 Judge Fitzgerald's integrity. She is a person of very sound
7 integrity. I'll give the matter some thought. I just don't
8 think I need her for this issue and to decide these matters.

9 But I'll let you know what my ruling is, all right,
10 after I've given it some thought. I'm going to reserve
11 decision. I know that the parties would love a decision
12 today and we'll certainly get something out as promptly as
13 we can. But I have some cases to go back and re-read.

14 And I will say this to you. I am heavily -- going
15 to heavily rely on Judge Starke's opinion -- ruling, I
16 think. You know, the Garlock decision, the Garlock case,
17 what Judge Hodges did or didn't do and that sort of thing is
18 not really what's going to drive my decision. It's going to
19 be the cases you've cited as well as Judge Starke's case in
20 particular. And that will guide me, I think, toward a
21 ruling.

22 So I appreciate good argument and very intense
23 argument. And I thank you all very much. And with that
24 we'll stand in recess.

25 (A chorus of thank you)

1 THE COURT: Thank you, everyone. Good travel to
2 you.

3 (Whereupon, these proceedings concluded at 1:34 p.m.)
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I N D E X

RULINGS

PAGE

Motion of Honeywell International Inc. for Access to
Rule 2019 Exhibits [Filed: 6/30/2016]

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Emergency Motion of the North American Refractories
Company Asbestos Personal Injury Settlement Trust
Advisory Committee to (1) Consolidate and Continue
Hearings and (2) Appoint Rule 2019 Expert and
Referee [Filed: 8/4/2016]

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C E R T I F I C A T I O N

We , Dawn South and Sherri L. Breach, certify that the
foregoing transcript is a true and accurate record of the
proceedings.

Dawn South

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Sherri L Breach

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Date: November 11, 2016

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